TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

138-562
140-679

No. 690.

ROBERT SCHELL, JAMES W. FELLOWS, AND EDWARD SCHELL, EXECUTORS OF AUGUSTUS SCHELL, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFFS IN ERROR,

vs.

VICTOR FAUCHÉ AND MARIUS A. SORCHAN, SURVIVING PARTNERS OF THE FIRM OF LACHAISE, FAUCHÉ, & COMPANY.

No. 691.

VICTOR FAUCHÉ AND MARIUS A. SORCHAN, SURVIVING PARTNERS OF THE FIRM OF LACHAISE, FAUCHÉ, & COMPANY, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 23, 1888.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the Southern district of New York, greeting.

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Victor Fauché & Marius A. Sorchan, survivors, &c., plaintiffs, and Robert Schell, James W. Fellows, & Edward Schell, executors of Augustus Schell, deceased, defendants, a manifest error hath happened to the great damage of the said Robert Schell, James W. Fellows, & Edward Schell, executors of Augustus Schell, deceased, as by their complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the fourth Monday of October, eighteen hundred and eighty-eight, in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, Hon. Samuel F. Miller, Senior Associate Justice of the said Supreme Court, the 6 day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.] JOHN A. SHIELDS.

The foregoing writ is hereby allowed.

ADDISON BROWN,
Judge.

2 UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, John A. Shields, a clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify, that the following pages numbered from five to two hundred and one, inclusive, contain a true and complete transcript of the records and proceedings had in said court, in the case of Robert Schell, James W. Fellows, and Edward Schell, executors of Augustus Schell, deceased, plaintiffs in error, against Victor Fauché and Mauris A. Sorchan, surviving partners, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this twentieth day of October, in the year of our Lord one thousand eight hundred and eighty-eight and of the Independence of the United States the one hundred and thirteenth.

[SEAL.] JOHN A. SHIELDS,
Clerk.

(Indorsed:) O. S. 324. U. S. Supreme Court. Robert Schell et al., etc., plaintiffs in error, against Victor Fauché, & ano., &c., defendants in

error. Writ of error. Stephen A. Walker, attorney for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this day of October, 1888. A. W. Griswold, attorney for defendants in error. U. S. circuit court. Filed Oct. 6, 1888. John A. Shields, clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Victor Fauché and Marius A. Sorchan, surviving partners, plaintiffs, and Robert Schell, James W. Fellows, and Edward Schell, executors of Augustus Schell, defendants, a manifest error hath happened to the great damage of the said Victor Fauché and Marius A. Sorchan, surviving partners, as by their complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the fourth Monday of October, eighteen hundred and eighty-eight, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Samuel F. Miller, Senior Associate Justice of the said Supreme Court, the 6th day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.] JOHN A. SHIELDS,
Clerk.

The foregoing writ is hereby allowed.

ADDISON BROWN,
Judge.

4 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from five to two hundred and one, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Victor Fauché and Marius A. Sorchan, surviving partners, plaintiffs in error, against Robert Schell, James W. Fellows, and Edward Schell, executors of Augustus Schell, deceased, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New

York, in the second circuit, this twentieth day of October, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

[SEAL.] JOHN A. SHIELDS,
Clerk.

(Indorsed:) O. S. 324. U. S. Supreme Court. Victor Fauché et al., plaintiffs in error, against Robert Schell et al., ex'rs, &c., defendants in error. Writ of error. Service of a copy of the within writ of error is hereby admitted, the 6 day of October, 1888. Stephen A. Walker, attorney for defendants in error. U. S. circuit court. Filed Oct. 6, 1888. John A. Shields, clerk.

5 N. Y. superior court.

ARMAND LACHAISE, VICTOR FAUCHÉ, M. Sorchan and J. L. Allien, *against* AUGUSTUS SCHELL. } Summons for money demand on contract.

To the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of the city of New York, at the city hall in said city, and to serve a copy of your answer to the said complaint on the subscribers at their office, No. 36 Wall street, New York, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of four thousand dollars, with interest, from the thirtieth day of September, one thousand eight hundred and fifty-seven, besides the costs of this action.

Dated September 10th, 1857.

A. W. GRISWOLD & DEMING,
Plaintiffs' Attorneys, 36 Wall street, New York.

6 (Endorsed:) N. Y. superior court—Armand Lachaise et al' ag'st Augustus Schell—Summons—A. W. Griswold & Deming' pl'ffs' att'ys.

7 N. Y. superior court.

AUGUSTUS SCHELL *ads.* ARMAND LACHAISE & AL. }

SIR: Please take notice that I am retained by and appear for the defendant in the above action, & I hereby demand a copy of the complaint herein.

Dated New York, September 15th, 1857.

Yours, resp'y,

JOHN MCKEON,
Def't's Att'y, 132 Nassau st.

To A. W. GRISWOLD & DEMING,
Pl'ff's Att'y.

(Endorsed:) Rec'd Sept. 26, 1857. N. N. D.

8 The President of the United States of America to the judges of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States, for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Augustus Schell, defendant, by Armand Lachaise, V. Fauche, A. M. Sorechan, and J. L. Allen, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the twenty-ninth day of October, A. D. 1857, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon, what of right ought to be done.

Witness, Roger B. Taney, esquire, Chief-Justice of the Supreme Court of the United States, the twenty-second day of October, in the year one thousand eight hundred and fifty-seven.

[L. S.] KENNETH G. WHITE,
Clerk.

JOHN MCKEON,
Defendant's Attorney.

9 (Endorsed:) U. S. circuit court. Augustus Schell ads. Lachaise (No. 1.) Certiorari. (Copy.) John McKeon, deft's att'y. Sir: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, Oct. 22nd, 1857. Yours, &c., John McKeon, def't. att'y. To A. W. Griswold.

10 U. S. circuit court.

ARMAND LACHAISE, VICTOR FAUCHÉ, M. A. Sorchan, and J. L. Allien,
vs.
AUGUSTUS SCHELL.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Armand Lachaise et al., come here into court, and by A. W. Griswold & Deming, their attorneys, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 10th day of September, 1857, last past, an action was commenced in the superior court of New York City, according to the laws of the State of New York, and the rules and practice of said court, in such case made and provided, in favor and in the name of the said plaintiff against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court on the 10th day of said September. That the defendant afterwards, by J. McKeon, his attorney, duly appeared in said action and such proceedings were thereupon had, that afterwards, and on the 29th day of October in the year of our Lord one thousand eight hundred and fifty-seven, the said action was in due form of law removed by writ of certiorari for further prosecution and the trial into this court, according to the act of Congress in such case

made and provided; and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court, according to the course and practice of this court which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly by their attorney aforesaid complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant on the 20th day of July, one thousand eight hundred and fifty-seven, at New York City, in the southern district of New York aforesaid, was indebted to the said plaintiffs in the sum of four thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant. And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiff the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested. And whereas also the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and con-
11 cerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there found to be in arrear, and indebted to the said plaintiffs in the further sum of four thousand dollars of like lawful money as aforesaid. And being so found in arrear, and indebted to the said plaintiffs, the said defendant in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.), has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same, or any part thereof, to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of four thousand dollars, and thereof the said plaintiffs bring suit, &c.

A. W. GRISWOLD & DEMING,
Pl'ffs' Att'ys.

(Indorsed:) U. S. circuit court. Lachaise A Fauché vs. Aug. Schell. Declaration. A. W. Grisworld & Deming, pl'ffs' att'ys. Please take notice, that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the book of common rules, kept in the office of the clerk of this court, at the city of New York, requiring

the within-named defendant to plead to said declaration in twenty days after service of copy thereof and notice of said rule or judgment, on his attorney. New York, ——— 188–. A. W. Griswold & Deming, pl'ffs' att'ys.

12 U. S. circuit court, southern district of New York.

AUGUSTUS SCHELL, COLLECTOR, &c., *ads.* ARMAND LACHAISE–VICTOR FAUCHÉ, M. A. Sorechan & J. L. Alien.	Pleas.

And the said defendant, Augustus Schell, by John McKeon, his attorney, comes and defends the wrong and injury, etc., and says that he did not undertake and promise in manner and form, hath above declared against him, and of this he puts himself on the country, and the said plaintiff doth the like, &c.

JOHN MCKEON,
Defendant's Attorney.

(Endorsed :) United States circuit court, southern district of New York. Augustus Schell ads. Armand Lachaise & al. Plea. John McKeon, def't's attorney. A. W. G. : Please take notice that the within is a copy of a plea this day filed in the office of the clerk of the U. S. circuit court, Oct. 31st, 1857. Yours, &c., John McKeon, def't's att'y. A. W. Griswold, esq.

13 N. Y. supreme court.

ARMAND LA CHAISE & VICTOR FAUCHÉ, M. A. Sorchan and J. L. Allien *against* AUGUSTUS SCHELL.	City & county of New York. Summons for money demand on contract.

To the above-named def't :

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the City & County of New York at City Hall in said city and to serve a copy of your answer to the said complaint on the subscriber, at his office No. 60 Wall st., New York City, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of five thousand dollars with interest from the 1st day of July one thousand eight hundred and fifty seven, besides the costs of this action.

Dated Sept. 23rd, 1858.

A. W. GRISWOLD,
Plaintiffs' Attorney, 60 *Wall St.*

(Endorsed :) LaChaise & Fauché vs. Schell—Summons—No. 2.

14 The President of the United States of America, to the judges of the supreme court of the State of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you, against Augustus Schell, defendant, by Armand La Chaise, Victor Fauché, A. M. Sorechan, and J. L. Allien, plaintiff, do therefore command you, that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the twenty-first day of October instant, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Roger B. Taney, esquire, Chief-Justice of the Supreme Court of the United States, the fifteenth day of October, in the year one thousand eight hundred and fifty-eight.

[L. S.]

KENNETH G. WHITE,
Clerk.

THEODORE SEDGWICK,
Defendant's Attorney.

15 (Endorsed:) U. S. circuit court. Augustus Schell ads. Armand La Chaise, Victor Fauché, A. M. Sorechan, & J. L. Allien. Copy. Certiorari. Theodore Sedgwick, def't's attorney. Sir: Take notice that the within is a copy of a certiorari this day issued in the within-mentioned cause out of the circuit court of the United States for the southern district of New York, dated Oct'r 15, 1858. Yours, &c. Theodore Sedgwick, U. S. dis't att'y & att'y for def't. To A. W. Griswold, esquire, pl'ffs' att'y.

16 U. S. circuit court.

AMAND LA CHAISE & VICTOR FAUCHÉ, M. A. Sorchan and J. L. Allien.
vs.
AUG. SCHELL.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court, and by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 24th day of September, 1858, last past, an action was commenced in the supreme court, according to the laws of the State of New York and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs, against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said supreme court on the ——— day of———. That the defendant afterwards, by T. Sedgwick, his attorney, duly appeared in said action, and such proceedings were thereupon had, that afterwards, and on the 15th day of October, in the year of our Lord one thousand eight hundred and fifty-eight, the said action was in due form of law removed by writ of certiorari for further prosecution and the trial into this court,

according to the act of Congress in such case made and provided; and the clerk of the said supreme court did thereupon return the said writ, with the summons aforesaid, and did file the same in this court, according to the course and practice of this court; which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant, on the 1st day of July, one thousand eight hundred and fifty-eight, at New York City, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of five thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant and at the special instance and request of said defendant. And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant and at the request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned when the defendant should be thereunto afterwards requested. And wherers also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of
17 and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of five thousand dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiffs, the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of five thousand dollars, and thereof the said plaintiffs bring suit, &c.

A. W. GRISWOLD,
Pl'ffs' Att'y

(Indorsed:) U. S. circuit court. A. La Chaise et al. vs. Aug. Schell. Declaration. A. W. Griswold, pl'ffs' att'y. Please take notice, that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the book of common rules, kept in the office of the clerk of this court, at the city of New York, requiring the

within-named defendant to plead to said declaration in twenty days after service of copy thereof and notice of said rule or judgement on his attorney. New York, 188—. A. W. Griswold, pl'ffs' att'y. Service of a copy of within is hereby admitted. Theodore Sedgwick. Novr. 3, 1858.

18 U. S. circuit court.

AUGUSTUS SCHELL
ads.
A. LA CHAISE, VICTOR FAUCHE, M. A. SORchan, & J. L. Allen. } Plea non-assumpsit.

And the said Augustus Schell, defendant in this suit, by Theodore Sedgwick, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have thereof declared, against the said defendant, and of this he puts himself upon the country, and the said plaintiffs likewise, &c.

THEODORE SEDGWICK,
Atty. for Deft.

(Endorsed:) U. S. circuit court. Augustus Schell ads. A. La Chaise, Victor Fauche, A. M. Sorchan, & J. L. Allen. Copy. Plea No. 2. Theodore Sedgwick, att'y for deft. Sir: Please to take notice that the within is a copy of the deft's plea in the above entitled action this day filed in the office of the clerk of the U. S. circuit court, Nov., 1858. Yours, &c., Theodore Sedgwick.

19 N. Y. superior court.

ARMAND LACHAISE, VICTOR FAUCHÉ, M. A. Sorchan, and J. L. Allien
against
AUGUSTUS SCHELL. } Summons for money demand on contract.

To the above named deft.:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of New York City, at City Hall, said city, and to serve a copy of your answer to the said complaint on the subscriber, at his office, No. 60 Wall st., said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of three thousand dollars, with interest from the 2d day of January, one thousand eight hundred and fifty-nine, besides the costs of this action.

Dated April 15th, 1859.

A. W. GRISWOLD,
Plaintiff's Attorney, 60 *Wall St.*

(Endorsed:) Superior court. A. Lachaise et al. agst. A. Schell. Summons (No. 3.) to Augustus Schell, esq. Served copy, plly., at C. H., this April 15th, 1869. W. J. C.

20 The President of the United States of America to the justices of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you, against Augustus Schell, defendant, by Armand La Chaise, Victor Fauché, A. M. Sorechan, and J. L. Allien, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 7th day of June, A. D. 1859, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Roger B. Taney, esquire, Chief Justice of the Supreme Court of the United States, the 28 day of May, in the year one thousand eight hundred and fifty-nine.

KENNETH G. WHITE,
Clerk.
THEODORE SEDGWICK,
Defendant's Attorney.

21 (Endorsed:) U. S. circuit court. Augustus Schell ads. Armand La Chaise & others. Certiorari No. 3. Theodore Sedgwick, def'ts attorney. Sir: You will please take notice that the within is a copy of a certiorari issued out of the circuit court, New York, May 28th, 1859. Theodore Sedgwick, U. S. dist. att'y, to A. W. Griswold.

22 U. S. circuit court.

ARMAND LA CHAISE ET AL.
vs.
AUGUSTUS SCHELL. } No. 3.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court and, by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 15th day of April, 1859, last past, an action was commenced in the superior court of New York City, according to the laws of the State of New York, and the rules and practice of said court, in such case made and provided, in favor and in the name of the said plaintiffs, against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court on the day of . That the defendant afterwards, by T. Sedgwick, his attorney, duly appeared in said action and such proceedings were thereupon had, that afterwards, and on the 7th day of June, in the year of our Lord one thousand eight hundred and fifty-nine, the said action was in due form of law removed by writ of certiorari for further prosecution and the trial into this court, according to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ with

the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorneys aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant on the 2nd day of January, one thousand eight hundred and fifty-nine, at New York City, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of three thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant and at the special instance and request of said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested; and whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concern-
23 ing divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear, and indebted to the said plaintiffs in the further sum of three thousand dollars of like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiffs, the said defendant in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiff of three thousand dollars, and thereof the said plaintiffs bring suit, &c.

A. W. GRISWOLD,
Plffs'. Atty.

(Indorsed:) U. S. circuit court. Armand La Chaise et. al. vs. Augustus Schell. Declaration No. 3. A. W. Griswold, plffs. atty. Please take notice that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the book of common rules, kept in the office of the clerk of this court, at the city of New York, requiring the within-named defendant to plead to said declaration in twenty days after service of copy thereof and notice of said rule or judgment on

his attorney. New York, , 188 . A. W. Griswold, plffs'. atty. Service of a copy of the within is hereby admitted. Theodore Sedgwick, deft. atty.

24 U. S. circuit court.

AUGUSTUS SCHELL *ads.* ARMAND LA CHAISE ET AL. } Plea, non-assumpsit.

And the said Augustus Schell, defendant in this suit, by Theodore Sedgwick, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form, as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs likewise, &c.

THEODORE SEDGWICK,
Att'y for Def't.

(Endorsed:) U. S. circuit court. Augustus Schell ads. Armand La Chaise et al. No. 3. Copy plea. Theodore Sedgwick, att'y for def't. Sir: Please to take notice that the within is a copy of the def's plea in the above-entitled cause, the original whereof was this day filed in the office of the clerk of this court at his office in the U. S. court building in the city of New York, dated June 25, 1859. Y'rs, &c., Theodore Sedgwick, def't's att'y. To A. W. Griswold.

25 N. Y. superior court.

ARMAND LA CHAISE, VICTOR FAUCHÉ, M. A. Sorchan, and J. L. Allien *against* AUGUSTUS SCHELL. } Summons for money demand on contract.

To the above-named def't:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of New York City at City Hall, said city, and to serve a copy of your answer to the said complaint on the subscriber, at his office, No. 60 Wall st., said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will take judgment against you for the sum of four thousand dollars, with interest from the 1st day of February, one thousand eight hundred and fifty-nine, besides the costs of this action.

Dated June 7th, 1859.

A. W. GRISWOLD,
Plaintiff's Attorney, 60 Wall St.

(Endorsed:) N. Y. superior ct. Armand La Chaise & ors. ag't Augustus Schell. Summons No. 4. Served pply. at C. H. this June 7, '59. W. J. C.

26 The President of the United States of America, to the justices of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Augustus Schell, defendant, by Armand La Chaise, Victor Fauché, A. M. Sorechan, and J. L. Allien, plaintiffs, do therefore command you, that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the twenty-fifth day of June, A. D. 1859, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Roger B. Taney, esquire, Chief Justice of the Supreme Court of the United States, the seventeenth day of June, in the year one thousand eight hundred and fifty-nine.

[L. S.]

KENNETH G. WHITE,
Clerk.

THEODORE SEDGWICK,
Defendant's Attorney.

27 (Endorsed:) U.S. circuit court. Augustus Schell, ads., Armand La Chaise et al. Copy. Certiorari No. 4. Theodore Sedgwick, deft's atty. Sir, take notice that the within is a copy of a certiorari, issued out of the circuit court of the United States for the southern district of New York, New York, 18. Yours, &c., Theodore Sedgwick, deft's atty., to A. W. Griswold, esq., plff's atty.

28 U. S. circuit court.

ARMAND LA CHAISE, VICTOR FAUCHÉ, M. A. Sorchan, and J. L. Allien
vs.
AUGUSTUS SCHELL.
} No. 4.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Armand La Chaise et al., the above-named plaintiffs, come here into court, and by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 7th day of June, 1859, last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York and the rules and practice of said court, in such case made and provided, in favor and in the name of the said plaintiffs, against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court; that the defendant afterwards, by his attorney, duly appeared in said action and such proceedings were thereupon had; that afterwards, and on the 25th day of June, in the year of our Lord one thousand eight hundred and fifty-nine, the said action was in due form of law removed by writ of certiorari for further prosecution and the trial into this court, according to the act of Congress in such case made and provided, and the clerk of the said superior

court did thereupon return the said writ with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant on the 1st day of February, one thousand eight hundred and fifty-nine, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of four thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned when the defendant should be thereunto afterwards requested. And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concern-
29 ing divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear, and indebted to the said plaintiffs in the further sum of four thousand dollars of lawful money as aforesaid; and being so found in arrear, and indebted to the said plaintiffs, the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.), has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs, the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of four thousand dollars, and thereof the said plaintiff bring suit, &c.

A. W. GRISWOLD,
Pl'ffs' Att'y.

(Indorsed:) U. S. circuit court. Armand Lachaise et al. vs. Augustus Schell. Declaration (copy). (4.) A. W. Griswold, pl'ffs att'y. Please take notice that, on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the book of common rules, kept in the office of the clerk of this court, at the city of New York, requiring the within-named defendant to plead to said declaration in twenty

days after service of copy thereof, and notice of said rule or judgment, on his attorney. New York, Aug. 23d, 1859. A. W. Griswold, pl'ffs' att'y. Service of a copy of within and of the above notice is admitted.

30 U. S. circuit court, southern district of New York.

AUGUSTUS SCHELL
ads.
ARMAND LA CHAISE, VICTOR FAUCHÉ, M. A. Sorchan, & J. L. Allien. } Plea.

And the said defendant, Augustus Schell, by Theodore Sedgwick, his attorney, comes and defends the wrong and injury when, &c., and says that he did not undertake and promise, in manner and form, as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiff doth the like, &c.

THEODORE SEDGWICK,
Def'ts Atty.

To A. W. GRISWOLD, Esq.,
Plffs' Atty.

(Endorsed:) U. S. circuit court. Augustus Schell, ads. Armand La Chaise & als. Copy. Plea. Theodore Sedwick, att'y for def't. No. 4. You will please take notice that the plea of the def't in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York, New York, Sept. 21st, 1859. Yours, &c., Theodore Sedgwick, def't's atty. To A. W. Griswold, esq., pl'ffs' atty.

31 N. Y. superior court.

ARMAND LA CHAISE, VICTOR FAUCHÉ, M. A. Sorchan, and J. L. Allien
against
AUGUSTUS SCHELL. } Summons for money demand on contract

To the above named deft.:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of N. Y. City, at city hall, said city, and to serve a copy of your answer to the said complaint on the subscriber, at his office, No. 60 Wall st., said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of five thousand dollars with interest from the first day of July, one thousand eight hundred and fifty-nine besides the costs of this action.

Dated Oct. 1st, 1859.

A. W. GRISWOLD,
Plaintiffs' Attorney, 60 *Wall st.*

(Endorsed:) N. Y. superior court. A. La Chaise et al. agt. A. Schell. Summons. No. 5. New York, Oct., 1859. Due service of a copy of the within is hereby admitted.

32 The President of the United States of America, to the Justices of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you, against Augustus Schell, defendant, by Armand La Chaise, Victor Fauché, A. M. Sorechan et J. L. Allien, plaintiffs, do therefore command you, that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the tenth day of December, A. D. 1859, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Roger B. Taney, esquire, Chief Justice of the Supreme Court of the United States, the first day of December, in the year one thousand eight hundred and fifty-nine.

[L. S.] KENNETH G. WHITE,
Clerk.

THEODORE SEDGWICK,
Defendant's Attorney.

33 (Endorsed:) U. S. circuit court. Augustus Schell ads. Armand La Chaise et als. Certiorari No. 5. Theodore Sedgwick, def't's att'y. Sir: Take notice that the within is a copy of a certiorari issued out of the circuit court of the United States for the southern district of New York, New York. Yours, &c., Theodore Sedgwick, def't's att'y. A. W. Griswold.

34 U. S. circuit court.

ARMAND LACHAISE, VICTOR FAUCHÉ, M. A. Sorchan & J. L. Allien, *vs.* AUG. SCHELL. } (5.)

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above plaintiffs come here into court, and by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 1st day of October, 1859, last past, an action was commenced in the superior court, according to the laws of the State of New York and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiff , against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court on the day of . That the defendant afterwards, by J. I. Roosevelt, his attorney, duly appeared in said action, and such proceedings were thereupon had that afterwards, and on the 8th day of December, in the year of our Lord one thousand eight hundred and 59, the said action was in due form of law removed by writ of certiorari for further prosecution and the trial into this court, according

to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ, with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs, according to attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant, on the 1st day of October, one thousand eight hundred and 59, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of five thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant and at the special instance and request of said defendant. And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant and at the request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned when the defendant should be thereunto afterwards requested; and whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concern-
35 ing divers other sums of money before that time due and owing from the said defendant to the said plaintiffs and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of five thousand dollars of lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiffs, the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.,) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of five thousand dollars, and thereof the plaintiffs bring suit, &c.

A. W. GRISWOLD,
Pl'ffs' Attorney, 60 *Wall St.*

(Indorsed:) U. S. circuit court. Lachaise, Fauché & Co., vs. Aug. Schell. Declaration 5. Wm. H. Dickinson, pl'ffs' att'y. Please take notice, that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the book of common rules, kept in the office of the clerk of this court, at the city of New York,

requiring the within-named defendant to plead to said declaration in twenty days after service of copy thereof and notice of said rule or judgment on his attorney. New York, , 188 . Wm. H. Dickinson, pl'ffs' att'y. Service of a copy of within is admitted. J. I. Roosevelt.

36 U. S. circuit court, southern district of New York.

AUGUSTUS SCHELL
ads.
ARMAND LA CHAISE, VICTOR FAUCHÉ, M. A. Sorchan & J. L. Allien. } Plea.

And the said defendant, Augustus Schell, by James I. Roosevelt his attorney, comes and defends the wrong and injury, when, &c., and says, that he did not undertake and promise in manner and form, as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

JAMES I. ROOSEVELT,
Def'ts Atty.

To A. W. GRISWOLD, Esq.,
Plff's. Atty.

(Endorsed:) U. S. circuit court. Augustus Schell, ads., Armand Lachaise et als. Plea. J. I. Roosevelt, att'y for def't, No. 5. You will please take notice that the plea of the def't in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York. New York, June 11, 1860, Yours, &c., J. I. Roosevelt, Def't's Att'y. To A. W. Griswold, esq., pl'ff's att'y. Rec'd June 11, '60.

37 N. Y. su'erior court.

VICTOR FAUCHÉ, M. A. SORCHAN, & J. L. ALLIEN.
against
AUGUSTUS SCHELL. } Summons for money demand on contract.

To the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of New York City, at the City Hall in said city, and to serve a copy of your answer to the said camplaint on the subscriber at his office, No. 60 Wall st., said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will take judgment against you for the sum of three thousand dollars, with interest from the first day of November, one thousand eight hundred and fifty-nine, besides the costs of this action.

Dated New York, Feb. 3d, 1860.

A. W. GRISWOLD,
Plaintiff's Attorney, 60 *Wall Street.*

(Endorsed:) New York superior court. Victor Fauché et al. against Augustus Schell. Summons. New York, 1860. Due service of a copy of the within is hereby admitted. Served copy of within on Augus-
38 tus Schell esq., collector at custom-house, this 3d day of February, 1860. John J. Cullen.

The President of the United States of America to the justices of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Augustus Schell, defendant, by Victor Fauché, A. M. Sorechan, & J. L. Allien, plaintiff, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the twelfth day of April, A. D. 1860, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Roger B. Taney, esquire, Chief Justice of the Supreme Court of the United States, the second day of April, in the year one thousand eight hundred and sixty.

[L. S.]

KENNETH G. WHITE,
Clerk.

JAMES I. ROOSEVELT,
Defendant's Attorney.

39 (Endorsed:) U. S. circuit court. Augustus Schell, ads., v. Fauché et al. Certiorari. No. 7. James I. Roosevelt, def't's att'y. To A. W. Griswold, esq., sir, take notice, that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, April 2, 1860. Yours, &c., James I. Roosevelt, def't's att'y.

40 U. S. circuit court.

VICTOR FAUCHE, M. A. SORCHAN, J. L. ALLIEN,
vs.
AUG. SCHELL.

SOUTHERN DISTRICT OF NEW YORK, *ss.:*

The above plaintiffs come here into court, and by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit: On the 3d day of Feb'y, 1860, last past, an action was commenced in the superior court, according to the laws of the State of New York, and the rules and practice of said court, in such case made and provided, in favor and in the name of the said plaintiffs, against the defendant herein, upon, and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court on the day of ; that the defendant afterwards, by J. I. Roosevelt, his attorney, duly appeared in said action, and such proceedings were thereupon had; that afterwards, and on the 4th day of April, in the year of our Lord one thousand eight hundred and

60, the said action was in due form of law removed by writ of certiorari for further prosecution and the trial into this court, according to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs, according to attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant on the 3rd day of Feb'y, one thousand eight hundred and 60, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of three thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit: On the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested. And whereas also the said defendant afterwards, to wit: On the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of
41 and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there found to be in arrear, and indebted to the said plaintiffs in the further sum of three thousand dollars of lawful money as aforesaid; and being so found in arrear, and indebted to the said plaintiffs, the said defendant in the consideration thereof, afterwards, to wit: On the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.), has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to, the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of three thousand dollars, and thereof the plaintiffs bring suit, &c.

A. W. GRISWOLD,
Att'y for plaintiffs, 60 *Wall st.*

(Indorsed:) U. S. circuit court. Victor Fanche et al., vs. Aug. Schell. Declaration. N. 7. Wm. H. Dickinson, pl'ffs' att'y. Please take notice, that on filing a declaration in this cause, with a copy whereof you are

hereby served, a rule has been entered in the book of common rules, kept in the office of the clerk of this court, at the city of New York, requiring the within-named defendant to plead to said declaration in twenty days after service of copy thereof, and notice of said rule or judgment on his attorney. New York. Wm. H. Dickinson, pl'ffs' att'y. Service of a copy of within is admitted. J. I. Roosevelt.

42 U. S. circuit court, southern district of New York.

AUGUSTUS SCHELL
ads.
VICTOR FAUCHÉ, M. A. SORCHAN, J. L. ALLIEN. } Plea.

And the said defendant, Augustus Schell, by J. I. Roosevelt, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form, as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs doth the like, &c.

J. I. ROOSEVELT,
Def'ts' Att'y.

To A. W. GRISWOLD, Esq.,
Pl'ff's Atty.

(Endorsed:) U. S. circuit court, Augustus Schell ads. Victor Fauché et al. Plea. J. I. Roosevelt, att'y for def't. (No. 7.) You will please take notice, that the plea of the def't in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York. New York, June 2, 1860. Yours, &c., J. I. Roosevelt, defts' att'y. To A. W. Griswold, esq., pl'ff's att'y.

43 U. S. circuit court, southern district of New York.

1. ARMAND LACHAISE, VICTOR FAUCHÉ, Marius A. Sorchan, and Julien L. Allien
vs.
AUGUSTUS SCHELL. } O. S. 324.

2. THE SAME
vs.
THE SAME. } O. S. 35.

3. THE SAME
vs.
THE SAME. } O. S. 152.

4. THE SAME
vs.
THE SAME. } O. S. 188.

5. THE SAME
vs.
THE SAME. } O. S. 262.

On reading and filing the foregoing affidavit of Victor S. Allien;
44 Now, on motion of Almon W. Griswold, attorney for plaintiffs,

Stewart L. Woodford, esquire, U. S. district attorney, appearing for the defendant:

It is ordered, that each of the above-entitled actions be continued in the name of Victor Fauché and Marius A. Sorchan, plaintiffs.

Dated Oct. 6th, 1880.

SAM'L BLATCHFORD.

Consented to.

STEWART L. WOODFORD,
U. S. Att'y.

(Endorsed:) U. S. circuit court, so. dist. of New York. A. Lachaise et al. vs. Augustus Schell & 4 other cases. Order continuing actions in in name of V. Fauché et al., pl'ffs. A. W. Griswold, pl'ff's att'y.

45 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit held at the United States court rooms, in the city of New York, on the 27th day of October, in the year of our Lord one thousand eight hundred and eighty-one.

Present: The Honorable Nathaniel Shipman, district judge.

VICTOR FAUCHÉ ET AL.
vs.
AUGUSTUS SCHELL. } O. S. 324.

SAME
vs.
SAME. } O. S. 35.

SAME
vs.
SAME. } O. S. 152.

SAME
vs.
SAME. } O. S. 188.

SAME
vs.
SAME. } O. S. 424.

On motion of A. B. Herrick, esq., assistant U. S. attorney, A. W. Griswold, esq., plaintiff's attorney, appearing in opposition thereto: It is

Ordered, that the five above-entitled actions be consolidated into one action, to be known as "Victor Fauché et al. vs. Augustus Schell, O. S. 324," the date of issue to remain the same.

Dated October 27th, 1881.

(Signed) N. SHIPMAN.

(Endorsed:) U. S. circuit court, so. dist. of New York. Victor Fauché et al., & other cases, vs. Augustus Schell. Certified copy. Order. Stewart L. Woodford, U. S. attorney.

46 United States circuit court, southern district of New York.

VICTOR FAUCHÉ ET AL. *vs.* AUGUSTUS SCHELL. } O. S. 324.

VICTOR FAUCHE ET AL. *vs.* AUGUSTUS SCHELL. } O. S. 265 (and other cases).

On reading and filing the annexed communication, addressed to the United States attorney for the southern district of New York by the executors under the last will and testament of Augustus Schell, deceased, dated May 8th, 1884, and on reading and filing the annexed consent of the attorneys for the respective parties to the above-entitled actions, dated May 8th, 1884, and after reading and filing the certificate, dated April 14th and 24th, 1884, respectively, of the clerk to the surrogate's court, referred to in the above-mentioned consent, now, on motion of Elihu Root, United States attorney, attorney for the defendants in each of the above-entitled actions,

It is ordered, That Robert Schell, James W. Fellows, and Edward Schell, executors under the last will and testament of Augustus Schell, deceased, be, and they are hereby, substituted as defendants in each of the above-entitled actions in the place and stead of said Augustus Schell, deceased.

Dated New York, May 13th, 1884.

WM. J. WALLACE.

47 (Endorsed:) O. S. 324 & 265, U. S. circuit court, south. dist. of New York. Victor Fauché et al. vs. Robert Schell et al., exrs., &c. Same vs. Same; order substituting executors as defendants. Elihu Root, def't's att'y.

48 U. S. circuit court, southern district of New York.

VICTOR FAUCHÉ ET AL *vs.* ROBERT SCHELL, ET AL., EXRS. } O. S. 324.

VICTOR FAUCHE ET AL *vs.* ROBERT SCHELL, ET AL., EXRS. } O. S. 265.

On motion of A. W. Griswold, attorney for plaintiffs, Stephen A. Walker, esq., U. S. attorney, appearing for the defendants, it is

Ordered, That the two above actions be consolidated into one action, to be known as O. S. 324, the date of issue to remain the same.

Dated June 15th, 1887.

HOYT H. WHEELER.

I consent to the above order.

STEPHEN A. WALKER,
U. S. Att'y & Att'y for Deft's T. G.

(Endorsed): O. S. 324 & 265, U. S. circuit court so. dist. of New York. Victor Fauché et al. vs. Robert Schell et al., exrs. &c., and action No. O. S. 265. Order consolidating actions and consent (certified copy). A. W. Griswold, pl'ff's att'y.

49 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Monday, the 17th day of October, in the year of our Lord one thousand eight hundred and eighty-seven, present the honorable E. Henry Lacombe, circuit judge.

VICTOR FAUCHE AND MARIUS A. SORCHAN, surviving partners,
vs.
ROBERT SCHELL, JAMES W. FELLOWS, AND Edward Schell, executors of Augustus Schell. } O. S. 324.

Now come the plaintiffs, by A. W. Griswold, their counsel, and move the trial of this cause.

Likewise come the defendants, by Henry C. Platt and Thomas Greenwood, assistant U. S. attorneys, their attorneys. Thereupon a jury is impanneled, and the cause proceeds to trial.

After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, on Thursday, October 27th, 1887, the jury, by direction of the court, render a verdict for the plaintiffs for the sum of fifty thousand five hundred and sixty-three $\frac{44}{100}$ dollars.

It is ordered that a certificate of probable cause be entered herein, and that the defendants have a stay of all proceedings on said verdict for sixty days.

JOHN A. SHIELDS, *Clerk.*

50 This action having been commenced in the superior court of the city of New York on the 10th day of September, 1857, by personal service of summons, and the defendant having thereafter appeared, and on his petition said cause having been removed into this court, issue was there joined on November 20th, 1857, and this action, with the five others therein mentioned between the same parties, after issue joined, were by two orders of this court, dated Oct. 27th, 1881, and June 15th, 1887, consolidated into one. And said cause came on for trial before a judge of this court and a jury on the 17th day of October, 1887, and on the 27th day of October, 1887, a verdict was duly rendered for the plaintiffs for the sum of fifty thousand five hundred and sixty-three & $\frac{44}{100}$ dollars.

Now, on motion of Almon W. Griswold, plaintiffs' attorney, it is

Ordered, That Victor Fauché and Marius A. Sorchan, surviving partners, plaintiffs, recover against Robert Schell, James W. Fellows, and Edward Schell, executors of Augustus Schell, deceased, defendants, the sum of fifty-three thousand four hundred and twenty & $\frac{26}{100}$ dollars damages and interest, and seventy-two & $\frac{30}{100}$ dollars costs, amounting in the aggregate to the sum of fifty-three thousand four hundred and ninety-two & $\frac{56}{100}$ dollars (53,492.56).

Judgment signed this 6 day of October, A. D. 1888.

JOHN A. SHIELDS, *Clerk.*

51 (Endorsed:) O. S. 324. U. S. circuit court south. dist. of New York. Victor Facuhe et al., surviving partners, vs. Robert Schell et al., executors, &c. Judgment roll. A. W. Griswold, p'lffs' atty. U. S. circuit court. Filed Oct. 6, 1888, 1 p. m. John A. Shields, clerk.

52 United States circuit court, southern district of New York.

VICTOR FAUCHE AND MARIUS A. SORCHAN, surviving partners of the firm of Lachaise, Fauche & Company,
vs.
ROBERT SCHELL, EDWARD SCHELL, AND JAMES W. FELLOWS, executors of the last will and testament of Augustus Schell, deceased.
} O. S. 324.

Plaintiffs' and defendants' joint bill of exceptions

On the 17th, 18th, 19th, 20th, 21st, 24th, 25th, 26th, and 27th of October, 1887, at a stated term of this court, begun and held on the 3rd Monday of October, 1887, before the Honorable E. Henry Lacombe, a circuit court judge, the aforesaid issue so joined as between the said parties as aforesaid, as by the record more fully appears, came on to be tried by a jury duly impanelled and sworn for that purpose, the said plaintiffs being represented by Almon W. Griswold, esq., and Almon W. Griswold, jr., esq., and said defendants by Stephen A. Walker, esq., United States attorney, and Henry C. Platt, esq., and Thomas Greenwood, esq., assistant United States attorneys.

53 In the course of the trial the said counsel for the respective parties did take and allege sundry exceptions to the rulings, instructions, charges, and directions of the court, and to the refusal of the court to give certain instructions and directions to the jury, as then and there prayed for by them, which said exceptions are hereinafter severally set forth.

To maintain the said issues upon their part plaintiffs produced testimony tending to show that during the years 1857–8 and 9, their firm, Lachaise, Fauche & Co., made sixty-two importations into the port of New York from France of mousseline delaines, composed wholly of worsted or worsted with a satin stripe.

These importations the defendants' testator, the late Augustus Schell, as collector of customs at said port, classified as delaines, and exacted thereon of plaintiffs said firm duty at the rate of 24 per cent. ad valorem under the provision for delaines contained in Schedule C, section 2, of the act of March 3, 1857, 11 U. S. Statutes at Large, 192.

Against this classification made and the rate of duty exacted by the collector, the plaintiffs' firm, under the act of February 26, 1845 (5 U. S. Statutes at Large, 727), made certain protests, claiming at the trial that the importations being mousseline delaines were under the act of 1857, dutiable at 19 per cent. ad valorem as "manufactures of worsted, or of which worsted shall be a component material not otherwise provided for." This suit was brought to recover the excess of duties exacted above 19 per cent. ad valorem on these importations.

54 It appeared that under the laws in force at the time the importations in suit were made.

Section 1 of the act of March 3, 1851 (9 U. S. Statutes at Large, p. 629), provided that "In all cases where there is or shall be imposed any ad valorem rate of duty on any goods, wares, or merchandise imported into

the United States it shall be the duty of the collector, within whose district the same shall be imported or entered, to cause the actual market value or wholesale price thereof at the period of the exportation to the United States in the principal markets of the country from which the same shall have been imported into the United States to be appraised, estimated, and ascertained, and to such value or price shall be added the costs and charges, except insurance, and including in every case a charge for commissions at the usual rates, as the true value at the port where the same may be entered, upon which duties shall be assessed."

Section 21 of the act of August 30, 1842 (5 U. S. Statutes at Large, p. 565), provided that "The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of goods, wares, or merchandise, and a greater number, should he or either of the appraisers deem it necessary, imported into said port to be opened, examined, and appraised, and shall order the package or packages so designated to the public stores for examination."

55 Section 4 of the act of May 28, 1830, (4 U. S. Statutes at Large, 410), provided that "no goods liable to be inspected or appraised as aforesaid shall be delivered from the custody of the officers of the customs until the same shall have been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector; provided, that the collector may, at the request of the owner, importer, consignee, or agent, take bonds with approved security in double the estimated value of such goods, conditioned that they shall be delivered to the order of the collector at any time within ten days after the package or packages sent to the public stores shall have been appraised and reported to the collector; and, if in the meantime any of the said packages shall be opened without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the said package or packages shall not be delivered to the order of the collector according to the condition of the said bond, the bond shall in either case be forfeited."

Section 12 of the act of August 30, 1842 (5 U. S. Statutes at Large, 561), provided that "on and after the day this act goes into operation the du ies on all imported goods, wares, and merchandise shall be paid in cash."

It also appeared that of the Treasury regulations issued February 1, 1857, in force at the time of said importations, article 384 provided that "general protests against the exaction of duties are not admissible, the law requiring a protest to be made to the collector of the customs in

56 writing, subscribed by the importer, or his duly authorized agent, at or before payment of the duties, setting forth distinctly and specifically his objections to the payment of the duties demanded. A general protest, it has been decided by the Department in conformity with judicial decisions, made on any one importation, can not be taken as extending and applying to future importations of a similar character."

Article 386 provided that "protests are not to be written on the entry but on a separate paper, to be marked with the number of the entry to which it belongs and kept in a proper file arranged for that purpose."

Article 387 provided that "whenever duties are paid under protest, collectors of the customs will have the protest carefully and accurately copied at length in a record to be kept for that purpose, properly compared, verified, and certified as a correct copy by the officer or officers making such comparison, the number and date of entry, name of importer, vessel, and description of merchandise in regard to which the protest is made, to be duly stated on the record for the purpose of identification. This precaution is deemed necessary as well for the protection of the importer as the United States in the event of the loss of the original protest by accident or otherwise."

At the trial it was stipulated by and between the respective parties to this action that mousseline delaines, composed wholly of worsted, or of worsted with a satin stripe, were under the tariff act of 1857 subject to a duty of 19 % as claimed by the plaintiffs.

57 Under a subpœna duces tecum issued on the part of the plaintiffs to the collector of customs, there were produced the various entries and invoices upon which the action was brought and the various protests made by plaintiffs, said firm, against the classification of the merchandise embraced in said entries, and the rate of duty exacted thereon upon which the plaintiffs relied for a recovery of the alleged excessive exaction. When the said entries and protests were offered in evidence various objections, hereinafter mentioned, were made by the defendants, but said objections were overruled and exceptions taken and the entries, 62 in number, together with the protests, were admitted by the court. The following schedule shows the various importations, the character of the protests, and many particulars relating thereto:

58 Exhibit No—	Name of vessel.	Date of payment.	Date of protest.	Kind of protest.	Attached, separate, written on entry.	Whether recorded.
1	A. Decatur	July 25, 1857	July 25, 1857	Specific	Attached	Not found.
2	Argo	" 29, "	" 27, "	"	Written on entry.	Do.
3	Trenton	" 29, "	" 27, "	"	Attached	Do.
4	Rattler	" 29, "	" 27, "	"	Written on entry.	Do.
5	Morning Star	Feb. 1, 1858	Jan'y 30, 1858	"	Attached	Jan. 30.
6	Admiral	" 1, "	Feb. 10, "	Prospective.	"	Feb. 10.
7	Logan	Mch. 26, "		No protest.		
8	Persia	June 24, "		No protest.		
9	Ariel	" 30, "	June 30, 1858	Specific	Attached	June 30.
10	Africa	July 10, "	July 9, "	"	"	Not found.
11	W. Frothingham.	" 12, "	" 9, "	Prospective	"	
12	Omega	" 20, "		No protest.		Do.
13	North Star	" 21, "	July 21, 1858	Prospective.	Attached	Do.
14	Vanderbilt	Aug. 3, "	Not dated	Specific	"	
15	Persia	" 5, "		No protest.		Not found.
16	Arajo	" 10, "	Aug. 10, 1858	Specific	Attached	Do.
17	Galena	" 11, "	" 10, "	"	"	Do.
18	Saxonia	" 20, "	" 20, "	"	"	Do.
19	Ariel	" 27, "		No protest.		
20	Alps	" 30, "		No protest.		
21	Zurich	Sept. 11, "	Sept. 10, 1858	Specific	Attached	Not found.
22	North Star	Oct. 15, "		No protest.		
23	Persia	" 27, "	Oct. 27, 1858	Specific	Attached	Not found.
24	Asia	Nov. 12, "	Nov. 12, "	"	"	Do.
25	Vanderbilt	" 17, "	" 17, "	"	"	Do.
59 26	Asia	Dec. 29, 1858	Dec. 28, 1858	Specific	Attached	Not found.
27	Fulton	Jan'y 6, 1859		No protest.		
28	Alps	" 13, "		No protest.		
29	Arago	Feb. 1, "	Jan. 31, 1859	Specific	Attached	Not found.
30	New Orleans	" 3, "	Jan'y 29, "	"	"	Do.
31	Wm. Tell	" 3, "	" 1, "	"	"	Do.

Exhibit No. —.	Name of vessel.	Date of payment.	Date of protest.	Kind of protest.	Attached, separate, written on entry.	Whether recorded.
32	Zurich	Feb. 16, 1859	Feb. 16, 1859	Specific	Separate	Feb. 16.
33	Lebanon	" 19, "	" 19, "	"	"	" 19.
34	Africa	" 23, "	" 23, "	"	"	" 23.
34½	Fulton	Mch. 1, "	Mch. 1, "	"	"	March 7.
35	Jura	" 7, "	" 7, "	"	"	Mar. 7.
36	Alps	Apl. 1, "	Apl. 1, "	"	Attached	Not found.
37	Corinne	" 13, "	" 11, "	"	"	Apl. 13.
38	Jura	" 29, "	" 28, "	"	"	Apl. 28.
39	Vanderbilt	May 23, "		No protest.		
40	Hammonia	June 6, "		No protest.		
41	F. Haynie	" 10, "	Not dated	Specific	Attached	Not found.
42	Harvest Queen	" 21, "		No protest.		
43	Ocean Queen	" 23, "		No protest.		
43A	Ocean Queen, (amended entry).	July 26, "		No protest.		
44	Mary	June 30, "		No protest.		
44A	Mary (amended entry).	July 19, "		No protest.		
45	Vanderbilt	" 6, "		No protest.		
46	Ariel	" 21, "		No protest.		
47	Africa	" 22, "		No protest.		
60 48	Ocean Queen (amended entry).	Aug. 3, 1859	Aug. 3, 1859	Specific	Attached	Not found.
48 A	" " "	" 23, "		No protest.		
49	W. Frothingham.	" 8, "	Aug. 5, 1859	Specific	Attached	Not found.
50	Vanderbilt	" 16, "	" 16, "	"	"	Do.
51	T. B. Bertram	" 24, "	" 24, "	"	"	Do.
52	Ariel	Sept. 2, "		No protest.		
53	Africa	" 3, "		No protest.		
54	Ocean Queen	" 16, "		No protest.		
55	Vanderbilt	" 27, "	Sept. 26, 1859	Specific	Attached	Oct. 3.
56	Fulton	Oct. 12, "		No protest.		
57	Africa	" 17, "	Oct. 17, 1859	Specific	Attached	Oct. 18.
58	Ocean Queen	" 26, "	" 26, "	"	"	Oct. 28.
58 A	Ocean Queen	Oct. 26, 1859		No protest.		
59	Persia	Dec. 10, "	Dec. 9, "	Specific	Attached	Dec. 12.
60	Bremen	" 17, "	" 17, "	"	Separate	" 20.
61	Arabia	Aug. 20, 1858		No protest.		
62	Persia	Sept. 18, "		No protest.		

61 Plaintiffs then produced as a witness in their behalf Amos A. Smith, who being duly sworn testified that he was a customhouse broker, and a member of the firm of William W. Thomas & Co., and had been such broker and member of such firm since the year 1854. That he was familiar with all the duties of customhouse brokers, and with the process of passing entries through the customhouse. The witness was then shown the entry by the Morning Star, of February 1, 1858, marked Exhibit 5, for identification, and having been asked to explain to the court and jury the process of passing an entry through the customhouse at the time that entry was made, testified that on presenting an entry to the customhouse certain papers are required, which are known as an entry, invoice, and bill of lading. The entry clerk at the customhouse, upon the entry, the invoice, and bill of lading, estimates and assesses the duty and carries the amount out on the face of the entry as in this case $828.72, and gives all the papers with a permit to the merchant who presents them all at the naval office to be countersigned or checked. After this is done they are again presented to the deputy collector when the oath to the entry is administered by him, the public store packages for examination are designated, and the merchant then signs a bond, which the collector requires, whereby the merchant obligates himself to deliver or return to the collector any packages that may have been delivered to

the merchant provided the same are wanted by the collector. The merchant then pays the duties. After the duties are paid the collector retains the entry and invoice and returns the permit to the merchant,
62 which has to be signed by the collector and naval officer. All the packages not ordered to public store for examination are then delivered to the merchant.

When the duties are paid the collector retains the entry and invoice, and gives to the merchant the permit which has to be signed by the collector and naval officer.

After an examination of the packages sent to the public store the appraiser makes a return of the goods as he finds them. The invoice is then examined by the collector and if he finds the rate of duty returned by the appraiser corresponds with the rate of duty exacted in the first instance, the packages are delivered to the merchant. If it does not agree, the entry is then liquidated and upon the payment of whatever may be found due the examined packages are delivered to the merchant. The invoice shows what packages are sent for such examination and appraisement. The date of the payment of duties appears upon the face of the entry, and is February 1, 1858. The following is a copy of said entry:

EXHIBIT No. 5.

Entry of merchandise imported by Lachaise Fauche & Co. in the ship Morning Star, whereof Foster is master, from Havre.

NEW YORK, 30, Jan'y 1858.

Marks.	Numbers.	Packages and contents.	Im.	Total.
L F.....	2197 & 2202	Six cases mousseline de laines.....	.....	17, 933. 00
		Charges 15 ea.....	.....	90. 00
		Each pa'kge alike.....	.....	18. 023. 00
		Commission 3%.....	.....	540. 69
		Francs.....	.....	18, 563. 69

Klm 3453. 24. 82872.
Pd. Feb. 1. W. D. R.

LACHAISE, FAUCHE & CO.

63 District and port of New York, consignee's, importer's, or agent's oath.

I, M. A. Sorchan, do solemnly and truly swear, that the invoice and bill of lading now presented by me to the collector of New York are the true and only invoice and bill of lading by me received, of all the goods, wares and merchandise, imported in the Morning Star, whereof Foster is master, from Havre, for account of any person whomsoever, for whom I am authorized to enter the same, that the said invoice and bill of lading are in the state in which they were actually received by me, and that I do not know nor believe in the existence of any other invoice or bill of lading of the said goods, wares, and merchandise; that the entry now delivered to the collector contains a just and true account of the said goods, wares, and merchandise, according to the said invoice and bill of lading; that nothing has been, on my part, nor to my knowledge, on the part of any other person, concealed or suppressed, whereby the United States may

be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise; and that if, at any time hereafter, I discover any errors in the said invoice, or in the account now rendered of the said goods, wares, and merchandise, or receive any other invoice of the same,
64 I will immediately make the same known to the collector of this district. And I do further solemnly and truly swear, that to the best of my knowledge and belief, Bonjour of Paris, owner of the goods, wares, and merchandise mentioned in the annexed entry; that the invoice now produced by me exhibits the actual cost, or fair market value in France, of the said goods, wares, and merchandise, all the charges thereon, and no other or different discount, bounty, or drawback, but such as has been actually allowed on the same.

M. A SORCHAN.

Sworn this 1 day of Feb'y, 1858, before me.

S. O. HUNT,
Collector.

(Usual owner's oath follows.)

To this entry as produced from the customhouse, attached by wafer, was a specific protest, duly signed by plaintiffs' firm, of which the following is a copy:

NEW YORK, *Jan'y* 30, 1858.

AUGUSTUS SCHELL, Esq.,
Collector of Customs:

SIR: We object to the classification of our "mousseline de laines," or "worsted mousselines," embraced in our entry per Morning Star, marked L. F. Nos. 2197 a 2202, 6 cases under schedule C, thereby subjecting them to a duty of 24 per centum ad valorem, while we claim they are liable to 19 per centum only, and for the following reasons, viz:

Because the article of "worsted mousseline," or "mousseline de laine," being a manufacture composed wholly of worsted, is subject only to
65 the duty imposed on worsted fabrics, viz: 19 per centum; that it has no connection with the article denominated and known among merchants and dealers in the article as "de laines," which is specified under schedule C, and which is composed of a cotton warp, and a worsted weft; that the article of "mousseline de laine," or "worsted mousseline," was known among merchants and dealers in the article at and long before the passage of the tariff act of March 3, 1857, by that name, as a manufacture of worsted, and as an article totally and entirely distinct from the fabric manufactured of worsted and cotton, known among merchants and dealers in the article exclusively by the title or name of "de laines;" that the article known as "mousseline de laine" is not manufactured in this country, while the article known as "de laine" is extensively produced here; and it could not have been the intention of Congress to impose a cotton duty upon an article manufactured wholly of worsted, and which did not come in competition with an American product.

For these reasons we contend that we are entitled to enter and pay duty on the above-described goods at the rate of duty imposed on manufactures of worsted, and protest against the payment of a higher rate of duty.

Yours, &c.,

LACHAISE, FAUCHÉ & CO.

Plaintiffs' counsel then offered in evidence said entry and the protest attached thereto by wafer, to which the defendant's counsel objected,
66 on the the ground, first, that it did not appear that said protest had been served upon Collector Schell, as required by the protest act of February 26, 1845; second, that, if so served, it did not appear that it had been so served at or before the payment of the duty sought to be recovered, as required by the same act.

These objections were overruled by the court, and to this ruling defendant's counsel duly excepted, which exception was noted and allowed.

The entry and said protest attached thereto were then admitted in evidence and marked Exhibit 5.

Like objections and rulings were made to each of the following importations, wherein a protest precisely like the protest Exhibit No. 5, had been presented, viz: Exhibit Nos. 9, 10, 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 36, 37, 38, 41, 49, 50, 51, 55, 57, 58, 59, 60, and like exceptions were duly taken, noted, and allowed on behalf of the defendants.

The witness Smith was then shown an amended entry, dated July 25th, 1857, of merchandise imported by the Anna Decatur, marked Exhibit 1, and, on being asked to explain the same to the court and jury, testified:

"This paper is what is known and recognized as an amended entry. The entry that I held in my hand a little while ago is an original entry. When an original entry is lost, or cannot be found, the collector, in assessing the balance of duties that may be found due, make up—or did at that time make up—what is termed the amendment of the entry, which
67 is such a paper as this I hold in my hand. This is the collector's copy, and that is a duplicate copy belonging to the naval officer. This paper shows the amount of duty which was originally paid on the original entry, or on the entry which was lost. It also shows the amount of ascertained or corrected duty found upon liquidation. So that if we had paid $500 originally on the entry, and there was found on liquidation to be $490 due, of course that entry would show that there was $10 due to the importer. Or, if the reverse should be the case, and he had not paid sufficient duty, that paper would show that fact and he would be called upon to pay the difference. And when paid, the fact of having been paid would be stated on the face of that entry by the cashier of the customhouse, whose business it is to receive it. This is what is known as amended entry—being the form which prevailed in the year 1857—certifying the payment of a certain amount of money."

Plaintiffs then produced evidence tending to show that the original entry and invoice by the Anna Decatur were lost and could not be found.

The witness Smith then testified that the amended entry by the Anna Decatur showed the amount of duties originally paid on the importations by that vessel, and that the amount subsequently paid in addition thereto was $622.32, and that this amount of $622.32 was the difference between the duties taken at the rate of 19% and 24% ad valorem on said importation.

68 Plaintiff's counsel then produced a letter from Howell Cobb, Secretary of the Treasury, to plaintiffs' firm, dated August 18, 1857, relating to the entry by the Anna Decatur, of which the following is a copy:

EX. NO. 1 A.—E. H. L.

TREASURY DEPARTMENT,
August 18th, 1857.

GENTLEMEN: An appeal taken by you from the decision of the collector at New York, on the classification of "mousseline de laines" or "worsted mousselines," embraced in your entries, as follows:

"Protested." July 20th, '57,	"Anna Decatur,"	G. B. C. 2069 a 2071	3c.
" " "	" "	H. S. T. 2073 a 2075	3c.
" July 27th, '57,	"Argo,"	L. F. 2019 a 2068	50c.
" " "	Trenton,	G. B. C. 2076 a 2086	11c.
" " "	"	L. F. 2091 a 2115	25
" " "	Rattler,	L. F. 2116 a 2157	42

under schedule C, thereby subjecting to a duty of 24 per cent. ad valorem, is received, and you are hereby informed that the decision of the collector is affirmed.

Very respectfully, your ob't serv't,

HOWELL COBB,
Secretary of the Treasury.

Messrs. LACHAISE, FAUCHÉ & CO.,
New York.

69 And having proved the signature thereto to be the signature of said Howell Cobb, offered the same in evidence, and stated that he ought to make this explanation in order that the court might understand the letter. "The fifth section of the tariff act of 1857 contained the provision that the decision of the collector as to liability to duty or exemption therefrom of any merchandise should be final and conclusive, unless a protest was made in writing within a certain length of time, and unless an appeal shall be made to the Secretary of the Treasury within thirty days after the entry; and then the decision of the Secretary of the Treasury should be final unless suit was brought within thirty days after the decision. We made an appeal to the Secretary of the Treasury on these importations; the Secretary sent our appeal to the collector of customs to ascertain whether we had made any protest, because if we had made no protest then the decision of the collector was final. If we had made a protest then the Secretary's answer was to be delivered to the importer. This is the answer we received to the appeal made on this very entry and certain other entries. You will see by it that the Secretary admits that we paid the duties under protest."

To the admission in evidence of this letter, defendant's counsel objected on the ground, first, that it was irrelevant and immaterial and also incompetent; second, that the act of 1857 as to protests has no relevancy, the Supreme Court having decided in Watson vs. Barney, 92 U. S., 449, that that act applied only to cases where there was a contention
70 between the importer and collector as to whether goods were subject to some duty or exempt from all duty. These objections the court

overruled, and to this ruling defendant's counsel excepted, which exception was duly noted and allowed. Thereupon said letter was admitted in evidence and marked Exhibit 1 A.

Plaintiffs' counsel then offered in evidence the amended entry by the Anna Decatur and the protest attached thereto, duly signed by plaintiffs' firm, the same being so attached to the entry when produced from the customhouse.

To the admission in evidence of this protest, the defendant's counsel objected, on the ground, first, that it did not appear that said protest was ever served upon the collector; second, that if it was so served, that it did not appear that it was so served at or before payment of the duties sought to be recovered, as required by the aforesaid protest act of 1845. These objections were overruled by the court, and to this ruling defendant's counsel excepted, which exception was duly noted and allowed. Thereupon the said amended entry by the Anna Decatur, and the protest attached thereto, was duly admitted in evidence, and marked Exhibit 1. The following are copies of said amended entry and protest:

EXHIBIT No. 1.—S. I. L.

CUSTOMHOUSE, *New York, July* 25, 1857.

Amendment of an entry of merchandise, imported by Lachaise Fauche & Co., in the ship Anna Decatur, —— master, from Havre, arrived June 1857.

Original entry on file of vessel.
71 Amount of duty paid, $3098.52 on the July, 1st, 1857.
Mousseline de laine:
Paid 2,593, a 19 %..... 494.67
Should be 2,593, a 24 %..... 622.32
129.65

H. C. H.

Say 540. a 24 %, 129.60.
Pd. 25 July. W. R.

Protest on Exhibit No. 1.

"NEW YORK, *July* 25, 1857.

"AUGUSTUS SCHELL, Esq.,
Collector of the Port of New York:

SIR: We hereby protest against the payment of a duty of twenty-four per cent. charged by you on worsted stuff goods, claiming that under existing laws said goods are only liable to a duty of nineteen per cent. as a manufacture of worsted. We pay the amount exacted by you to obtain possession of the goods, claiming to have the difference refunded.

LACHAISE, FAUCHE & CO."

Plaintiffs' counsel then offered in evidence the entry by the Argo of July 29, 1857, Exhibit No. 2, and the protest written thereon. To the introduction in evidence of this protest defendants' counsel made the
72 same objections as were made to the introduction in evidence of the protest attached to Exhibit 1, and the additional objection that the protest did not distinctly and specifically set forth the grounds of the ob-

jection to the payment of the duties sought to be recovered as required by the aforesaid protest act of 1845. The court overruled these objections. To this ruling defendants' counsel excepted, which exception was duly noted and allowed. Thereupon said entry with the protest written thereon were admitted in evidence and marked Exhibit No. 2. The following are copies of said entry and protest:

EXHIBIT NO. 2.

Entry of merchandise imported by Lachaise, Fauche & Co. in the ship Argo, whereof Ballard is master, from Havre.

NEW YORK, *July* 27, 1857.

Marks.	Numbers.	Packages and contents.	Im.	Total.
L. F.....	2019 a 2068	Fifty cases worsted mousselines de laines.....	Paris.	87, 131. 40
		Charges 15 ea.....		750. 00
		Com. 3 per cent.....		87. 881. 40
				2. 636. 43
		Francs.....		90, 517. 83

16, 836. 24. 4, 040. 64.
Pd. July 29. J. H.
Liq. Aug. 10, '57.

LACHAISE, FAUCHE & CO.

Protest on Exhibit No. 2.

NEW YORK, *July* 27, '57.

AUGUSTUS SCHELL. Esqr.,
Collector of the Port of New York.

SIR: We hereby protest against the payment of a duty of 24 per
73 cent. charged by you on worsted stuff goods, claiming that under existing laws said goods are only liable to a duty of 19 per cent. as a manufacture of worsted. We pay the amount exacted to obtain possession of the goods, claiming to have the difference of duty refunded.

Yours respectfully,

LACHAISE, FAUCHE & CO. *M.*

Plaintiffs' counsel then offered in evidence the entry by the Trenton, July 29, 1857, marked Exhibit 3, and the protest written thereon, and the invoice of the goods mentioned therein.

To the admission in evidence of this protest defendants' counsel made the same objection as was made to the admission in evidence of protest of Exhibit No. 2. These objections were overruled by the court, and to this ruling defendant's counsel excepted, which exception was duly noted and allowed. Thereupon the said entry and protest and invoice by the Trenton were admitted in evidence, and marked Exhibit No. 3, of which the following are copies.

74 EXHIBIT No. 3.

Entry of merchandise imported by Lachaise, Fauche & Co. in the ship Trenton, whereof Green is master, from Havre.

NEW YORK, *July* 27, 1857.

Marks.	Nos.	Packages and contents.		19.	24.	Total.
GBC LF	2076–2086 *2087–2088	Thirteen cases worsted mousseline delaines	1,837.1		26,700.10	
	*2089	One do. do.			3,960.15	
	*2090	One do. do.			4,152.15	
	2091 to 2112	Twenty-two do.			39,743.00	
	2113 to 2115	Three do do.			9,493 55	
		Charges			695.60	
					84,754.55	
		Discount			3,614.05	
					81,140.50	
		Charges 15 ea			600.00	
		Com. 3 per cent			2,430.	
					84,170.50	84,170.50
L & F	5819	One case silks, Lyons	3,965.30			
		Com'n 2 per cent	79.00			
		Charges	15.00	4,059.30		4,059.30
		Francs		4,059.30	83,170.50	88,229.80

*Am'd Aug. 17, '57, ref. Cmf. cs. worsteds. I. M G.

$3,538.....19..... 672.22	$755	$15,656
12,873.....24..... 3,089.52	2,783	2,783
E. M. E. $3,761.74	$3,538	$12,873

Refunded excess Aug't 21, 1857.
P'd July 29. J. H.

LACHAISE, FAUCHE & CO.

75 *Protest on Exhibit No. 3.*

NEW York, *July 27th*, 1857.

AUGUSTUS SCHELL, Esq'r:

SIR: We hereby protest against the payment of a duty of 24 per cent charged by you on worsted stuff goods, claiming that under existing laws said goods are only liable to a duty of 19 per cent. We pay the amount exacted to obtain possession of the goods, claiming to have the difference of duty refunded to us.

Yours, respectfully,

LACHAISE, FAUCHE & CO.

The invoice of the goods in suit per the Trenton designated said goods as "mousseline delaines."

76 Plaintiffs' counsel then offered in evidence entry per the Rattler, July 29, 1857, Exhibit 4, and the protest written thereon. To the admission in evidence of this protest defendants' counsel made the same objections as last stated. These objections the court overruled, and to this ruling defendants' counsel excepted, which exception was duly noted and

allowed. Thereupon the said entry and protest by the Rattler were admitted in evidence and marked Exhibit 4, of which the following are copies:

EXHIBIT No. 4.

Entry of merchandise imported by Lachaise, Fauche & Co. in the ship Rattler, whereof Almy is master, from Havre.

NEW YORK, *July* 27, 1857.

Marks.	Numbers.	Packages and contents.	Im.	Total.
L. F.	2116 a 2156 2157	Forty-one cases worsted mousseline de laine .... One do. Cases	Paris	74, 022. 75 3, 181. 85 710. 00
				77, 914. 60
		Discount		3, 243. 90
				74, 670. 70
		Charges 15 ea		630. 00
				75, 300. 70
		Com. 3 per cent		2, 259. 00
		Francs		77, 559. 70

LACHAISE, FAUCHE & CO.

14426. 24. 3,462.24.
P'd July 29. J. H. M.

77 *Protest on Exhibit No.* 4.

NEW YORK *July* 27*th*, 1857.

AUGUSTUS SCHELL, Esq.:

SIR: We hereby protest against the payment of a duty of 24 % charged by you on worsted stuff goods, claiming that under existing laws said goods are only liable to a duty of 19 %. We pay the amount exacted to obtain possession of the goods, claiming to have the difference of duty refunded to us.

Yours, respectfully,

LACHAISE, FAUCHE & CO.

Plaintiffs' counsel then offered in evidence entry, invoice, and protest by the Admiral, of February 11, 1858, marked Exhibit 6, the invoice of the merchandise mentioned therein, and the protest attached by wafer to said entry:

The protest in this instance consisted of two forms of protest, one printed on white, being like Exhibit No. 5, but unsigned, and the other on blue paper, the latter being pasted to the former and signed by plaintiffs' said firm. The two printed papers thus pasted together and signed, as aforesaid, were attached to the entry by a wafer and, read together, made the following form of protest:

"NEW YORK, *Feb'y* 10*th*.

AUGUSTUS SCHELL, Esq.,
Collector of Customs:

78 SIR: We object to the classification of our "mousseline de laines," or "worsted mousselines," embraced in our entry per marked L. F., Nos. 2164 a 2196 under schedule C, thereby

subjecting them to a duty of 24 per centum ad valorem, while we claim they are liable to 19 per centum only, for the following reasons, viz:

Because the article of "worsted mousseline" or "mousseline de laine," being a manufacture composed wholly of worsted, is subject only to the duty imposed on worsted fabrics, viz: 19 per centum; that it has no connection with the article denominated and known merchants and dealers in the article as "de laines," which is specified under Schedule C, and which is composed of a cotton warp and a worsted weft; that the article of "mousseline de laine," or "worsted mousseline," was known among merchants and dealers in the article, and long before the passage of the tariff act of March 3d, 1857, by that name, as a manufacture of worsted, and as an article totally entirely distinct from the fabric manufactured of worsted and cotton, known among merchants and dealers in the article exclusively title or name of "de laines;" that the article known as "mousseline de laine" is not manufactured in this country, while the article as "de laine" is extensively produced here; and it could not have been the intention of Congress to impose a cotton duty upon an manufactured wholly of worsted and which did not come in competition with an American product.

For these reasons we contend that we are entitled to enter and pay duty on the above described goods at the rate of duty imposed manufactures of worsted, and protest against the payment of a higher rate of duty.

79 SIR: We protest against paying duty on two and a half per centum or three per centum commissions as charged on the merchandise embraced in the annexed entry, believing by law said goods are liable only to duty on two per centum commission, that being the usual rate of commission in the principal markets of the country from which said merchandise is imported. We claim that we ought not to be prejudiced by the fact that two and a half per centum or three per centum is charged on the invoice, because that rate has been added by the consignor to conform to the requirements at the custom-house, and not because such commission was paid, or was the usual rate in the market whence the merchandise is imported.

We also protest against being compelled to pay duty on commission computed on the "charges" or expenses on the merchandise embraced in the annexed entry, believing commission is chargeable only on the cost of or market value of said merchandise without the "charges."

We also protest against paying fees for oaths to entries, stamps on invoices, and orders from one department of the custom-house to another, believing there is no provision of law requiring us to pay the same; and we pay the amount exacted on this entry in order to get possession of the goods. You are hereby notified that we desire and intend this protest to apply to all future similar importations made by us.

(A. W. G.)

LACHAISE, FAUCHÉ & CO.

80 To the admission in evidence of this protest, defendants' counsel made the same objections as were made to the admission in evidence of the protest attached to Exhibit I, and the further objection that the protest, as to delaines, appears never to have been signed, and that the

signature to the charges and commission protest printed on said blue paper is not a signature to the delaine protest as required by the aforesaid protest act of 1845. These objections the court overruled, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed. Thereupon said entry and invoice and protest by the admiral were admitted in evidence and marked Exhibit 6.

During the trial entries Exhibit Nos. 11 & 13, accompanied by protests in all respects like Exhibit 6 were offered in evidence. To each of these offers counsel for the defendant interposed the same objections as urged to Exhibit 6, which objections were overruled and the exception of the defendants to the rulings of the court were duly noted and allowed.

In the case of the importations Exhibit Nos. 32, 33, 34, 34½, and 35, the protest was in all respects like Exhibit No. 5, but were detached from the entries and were indorsed as follows: In case of Exhibit No. 32, "3534 Lachaise, Fauché & Co., Zurich, Feb. 16, '59;" No. 33, "3569, Lachaise, Fauché & Co., Lebanon, Feb. 19, '59;" No. 34, "3640, Lachaise, Fauché & Co., Feb. 23, '59;" No. 34½, "3823, Lachaise, Fauché & Co., Fulton, Mar. 7, '59;" No. 35, 3822, Lachaise, Fauché & Co., Jura, Mar. 7, '59."

81 To the admission in evidence of each of which protests counsel for the defendant made the same objections as were made to Exhibit No. 5, which objections were overruled, and to said rulings defendants' counsel excepted and the exceptions were duly noted and allowed.

Plaintiffs' counsel also offered in evidence a withdrawal entry and invoice by the Logan of October 12, 1857, and marked Exhibit 7. No protest accompanied this entry, the plaintiffs relying for recovery upon the prospective clause in the prior protest of Exhibit No. 6, claiming that the duties were covered by this protest and that this protest with its future clause was made before July 1st, 1864, when the act relating to prospective protests went into operation.

Defendants' counsel objected to the admission in evidence of said entry and invoice by the Logan, on the ground, first, that the plaintiffs' firm had made no protest as to the duties exacted on the merchandise mentioned therein, and could not, therefore, recover under said protest act of February 26, 1845. Second, that they were not entitled to recover thereon under the mousseline delaine protest of Exhibit 6, because there is no future clause found in that mousseline delaine part of the protest, but such clause is found in the charges and commissions protest, and that the arrangement of these two protests and everything about them leads to the inference, until the contrary is shown, that the plaintiffs never intended to apply

82 the prospective protest clause in the charges and commissions protest to the mousseline delaine protest, to which it is attached. And, third, that if such prospective clause be considered a part of the mousseline delaine protests, plaintiffs are not entitled to recover as to this entry under said protest act by virtue of such prospective clause.

The court overruled these objections, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed. Thereupon the entry and invoice by the Logan were admitted in evidence, and marked Exhibit 7.

In the case of the importation Exhibit No. 8 no protest accompanied the entry. The plaintiffs relied and claimed as in case of the importation

of Exhibit No. 7. To the admission in evidence of the entry and invoice of Exhibit No. 8, defendants' counsel made the same objections to the admission in evidence of the entry and invoice of Exhibit No. 8, as were made in case of those of Exhibit No. 7, which objections were overruled and the exception of the defendants to the ruling of the court was duly noted and allowed.

In the case of the importation of Exhibit No. 12 no protest accompanied the entry and the plaintiffs relied for recovery upon the prospective clause of the prior protest of Exhibit No. 6 and No. 11, claiming that the duties were covered by these protests and that these protests with future clause were made before July 1st, 1884, when the act relating to prospective protests went into operation. To the admission in evidence of the entry and invoice of Exhibit No. 12 defendants' counsel made the
83 same objections, which objections were overruled and the exceptions of the defendants to the ruling of the court was duly noted and allowed.

In case of the importation of Exhibit No. 15, no protest accompanied the entry. Accompanying the prior importation of Exhibit No. 14 was a specific protest precisely like the protest of Exhibit No. 5. Plaintiffs relied for recovery as to Exhibit No. 15 upon the prospective clause of the prior protests of exhibits Nos. 6, 11, and 13, claiming that the duties were covered by these protests and that these protests with future clauses were made before July 1, 1864, when the act relating to prospective protests went into operation. To the admission in evidence of the entry and invoice of Exhibit No. 15 defendants' counsel made the same objections and the further objection that whatever the effect of the prospective clause of the protests of Exhibit No. 6, 11, and 13 might otherwise be, its effect was, under the authority of Baxter vs. Maxwell, 4 Blatch., 48, nullified by the intervening specific or special protest of Exhibit No. 14, which objections were overruled and the exceptions of the defendants to ruling of the court was duly noted and allowed.

In the case of each of the importations of Exhibits Nos. 19, 20, 22, 27, 28, 39, 40, 42, 43, 43 A, 44, 44 A, 45, 46, 47, 48 A, 52, 53, 54, 56, 58
84 A, 61, 62, no protest accompanied the entry. Plaintiffs relied for recovery and made the same claim as just stated, and to the admission in evidence of each of the entries and invoices of said exhibits, the defendants' counsel made the same objections as just stated, which objections were overruled and the exceptions of the defendants to the rulings of the court duly noted and allowed.

Plaintiffs' counsel then offered in evidence the entry by the Vanderbilt, of August 3, 1858, marked Exhibit 14, the invoice of the merchandise mentioned therein, and a protest attached thereto, without date, of the same form as the protest of Exhibit 5, and duly signed by the plaintiffs' firm.

To the admission in evidence of this protest defendants' counsel made the same objections as were made to the admission in evidence of the protest of Exhibit No. 5, and the further objection that the protest was without date. These objections were overruled by the court, and to this ruling the defendants' counsel excepted, which exception was duly noted and allowed.

To the admission in evidence of each of the protests of Exhibits Nos.

16 and 41, which were each of the same form as the protest of Exhibit No. 5, but without date, the defendants' counsel made the same objection, which objections were overruled, and the exceptions of the defendants' counsel to these rulings of the court were duly noted and allowed.

Plaintiffs' counsel then offered in evidence the entry by the
85 Africa, February 23, 1859, Exhibit 34, and a detached or separate protest, without mention of the vessel therein, endorsed: "3640, Lachaise, Fauche & Co., February 23, '59," of the same form as the protest of Exhibit 5, and duly signed by the plaintiffs' firm.

To the admission in evidence of this protest defendants' counsel made the same objections as were made to the admission in evidence of the protest of Exhibit 5. These objections were overruled, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

Plaintiffs' counsel then presented a statement prepared by I. Augustus Stanwood, the refund clerk in the customhouse, showing a computation of the difference between the duty at 19 per cent. on the Mousseline delaines mentioned in the exhibits heretofore admitted in evidence, and also showing the computation of interest thereon, all of which had been examined and checked by the naval office. This statement was offered in evidence, admitted by the court, and marked "Exhibit 63."

Defendants' counsel then produced, as a witness in their behalf, Peter M. Kelly, who, being duly sworn, testified: That he was an inspector employed at the customhouse in this city, and had been employed to do clerical work, particularly on the so-called mousseline delaine suits since May last; that during that time he had examined various papers and records connected with those suits; that he had examined certain
86 books in the customhouse called protest books, numbered from 6 to 13, inclusive; that these books were books in which a record of protests was kept, with the dates of their receipt at the customhouse. The witness, on being handed volume No. 9 of these protest books and asked to explain it to the court and jury, testified that it was a book containing a record of the protests filed against Collector Schell at various dates between June 24th and September, 1858. The defendants' counsel then offered in evidence volumes 6, 7, 8, 9, 10, 11, and 12 for the purpose of showing that certain of the protests in suit were not recorded in any of these protest books, as required by the instructions of the Secretary of the Treasury issued February 1st, 1857, and as evidence tending to show that they were not delivered to the collector at or before the payment of duties, as required by the protest act of 1845.

To the admission in evidence of each of these protests books the plaintiff's counsel objected on the ground that under the protest act of 1845 (U. S. Statute at Large, vol. 5, page 727) neither the Secretary of the Treasury nor the collector of customs can dictate in what way the merchant shall make his protest, and that the only requirement of the act was that the protest should be in writing, signed by the importer and setting forth the ground of objection.

But the court overruled the objection and admitted the books in evidence, stating that it would subsequently rule on the effect to which ruling counsel for the plaintiffs duly excepted, and such exception was noted and allowed.

87 DEFENDANTS' COUNSEL. I should like to ask counsel on the other side if he concedes that these are protest books which have been in the customhouse and kept in the customhouse from the time at which the entries therein purport to have been made until the present time?

PLAINTIFFS' COUNSEL. I do.

AMOS A. SMITH, being recalled on the part of the plaintiffs, was shown an amended entry by the Anna Decatur, Exhibit 1, and on being asked if he wished to modify his testimony given by him as to its being an amended entry prepared in consequence of the original being lost, testified:

"This entry that I hold in my hand purports to be and is what is recognized and known at the customhouse as an amended entry. That is the character of this paper. It is a form of paper that was issued at the time whenever there arose an increase of duty—whenever the appraiser returned an invoice showing that there was a greater amount of money due than was exacted by the collector at the outset, and what is known as an estimated duty. That difference in duty is made up on what is termed an amended entry, which is a supplementary paper having reference to the original paper, and as I look at that paper that is what it is, an amendment of an entry, giving the name of the importer, the vessel, where from, the date of arrival, showing with the original entries on file, what vessel, the amount of duty paid, and when it was paid. It also shows the character of the goods. It shows the difference between what was paid and what was due, and when it was paid as well.

88 Q. Is that the naval office copy of the same amended entry? [Handing a paper to the witness.]

A. Yes, sir; it is the naval office copy. I recognize the writing of the man that made it, too; away back in 1857.

Q. Now, Mr. Smith, those two papers—one is supposed to be a copy of the other.

A. Yes, sir; one is a copy of the other.

Plaintiffs' counsel then offered in evidence the naval office copy of the amended entry by the Anna Decatur, Exhibit I, and the same was admitted in evidence and marked Exhibit 1 A.

The witness, on being shown the protest attached to Exhibit 1, testified that he did not recognize the handwriting of the body of the protest; that he recognized the handwriting of the endorsement on the back, namely, "Lachaise, Fauche & Co., A. Decatur, July 25, 1857," as the handwriting of a gentleman he had known for years, but whose name he could not recall; that the gentleman was known as the endorser. At the date of such endorsement the entries, whether import entries or not, required to be endorsed; that the special business of the gentleman who made the endorsement in the case of Exhibit 1 was to endorse such papers, and he was a clerk in the customhouse in the auditor's department.

The witness was then shown Exhibit No. 2, and on being asked to look inside the entry and see if he recognized the brokers who passed the entry at the customhouse, testified that the brokers were Schuyler & Bluxome; that he did not recognize the handwriting on the face of the entry;

89 that the endorsement on the back of the entry was that of the clerk who had made the endorsement on the protest of Exhibit No. 1. That the endorsement on the back of Exhibits 3, 4, 5, and 6, was in the handwriting of the same clerk.

Q. What access, if any, does the merchant or his broker have to an entry after he has paid his duty and deposited his entry at the customhouse?

A. He has no access to it directly, and for about twenty-four hours, at which time he only has access to it in case of goods going under general order, requiring certain packages to be delivered. It is essential then that he have the entry to verify the proof of payment, in which case he goes to the impost room to get that entry out of its regular course. That is the only access he has.

Q. That is where goods have gone under general order?

A. Where goods have gone under general order, and it is necessary to have that access at once instead of waiting for that entry to reach its final destination. Privilege is granted to him to get at that entry ad interim for the purpose of getting possession of the general order goods, and the papers are immediately returned to the place from which he got them.

The witness continuing, testified: After the entry is left at the cashier's office, it is left there for the purpose of transcribing into the cashier's book the amount of duty paid. It then goes to the impost room. There it goes
90 through for like purposes and for the purpose of taking off the places from which the goods are supposed to have come. In the meantime no one except Government officials is permitted to have the custody or handling or control of those papers. They go from the cashier's desk to the impost room through the hands of a messenger who transports them to that particular place. This takes about twenty-four hours. And then from the impost room they go to the 5th division to be filed according to the vessel—no, pardon me, after they leave the impost room they then go to the auditor's office to the party whose business it is to make that endorsement on the entry. Those entries then go to another department where the vessels are kept in alphabetical order according to the name of the vessel. These entries are then taken out and the A's are put where they belong, and the B's and the C's, and so on. There are certain places there apportioned for certain vessels, varying according to the size of the vessel. A steamer takes, of course, a larger place than a smaller vessel. So a party desiring to go there and see an entry simply says: I want to see John Smith by the steamer Arago, and the clerk, with the permission of the chief clerk, allows him to see that entry under the supervision of the clerk in charge.

By the COURT. (Q.) Practically he takes it to some desk and examines it?

A. No, sir; I say I would like to see such an entry. You tell a man to get it for me and I take the file and look at it in his presence.

91 Q. You stand by the desk?

A. Right by the desk, the same as I do here. No papers are supposed to be taken away from the customhouse whatever, and no papers examined except under the immediate eye of the official in charge.

By a JUROR. (Q.) Are Schuyler & Bluxome in business yet?

A. No, sir.

Q. Are there successors in business?

A. Yes, sir.

Q. Are Bluxome & Co. the successors of that firm?

A. The old firm of Schuyler & Bluxome are dead. This Mr. Bluxome, who is now living, at that time was in the warehouse business, and by reason of Mr. Bluxome, of Schuyler & Bluxome, having deceased, he naturally succeeded to the business, conducting a warehouse business and a broker business as well. All the members of that firm are dead. They were Robert Schuyler, Bluxome, and Christopher King. King had an interest in the business, although his name did not appear in the firm. They have all been dead at least fifteen years.

By the PLAINTIFF'S COUNSEL. (Q.) There is a firm of Schuyler ——

A. There was a firm of Schuyler & Dumont, if that is what you mean.

Q. A firm of Bluxome & Co.?

A. Bluxome & Co. Mr. Bluxome, of that company, kept a bonded warehouse. He never had anything to do with the brokerage business until the death of the concern of Schuyler & Bluxome.

Witness Smith, on cross-examination, testified that the goods mentioned in the amended entry by the Anna Decatur, Exhibit 1, were ap-
92 parently entered for consumption July 1st, 1857. The duty thereon was paid upon their arrival. All the other cases of such goods, with the exception of the public store case, went into the possession of the merchant.

Q. Will you state to the court and jury when the duties were paid on that amended entry, Exhibit 1?

A. Well, they were paid upon the 25th of July. The year is not given on the face of this entry.

Q. Is the date of the——

A. The date of the entries—I remarked before the original entry was made on the 1st day of July, 1857, and the amended entry reads, "Paid 25th of July. W. D. R.," for W. D. Robinson. I presume it is the 25th of July, 1857, the same year. They did business different in those days from what they do now.

Q. So that in the case of that entry at least the goods were unmistakably delivered long before the amended entry was made?

A. Oh, no; all but the public store——

Q. Wait a moment, Mr. Smith. When goods are entered for consumption what becomes of them?

A. When the goods are entered for consumption all the cases, packages, whatever they may be, with the exception of the public-store packages, such packages as the collector orders to the public stores for examination, are delivered to the merchant, either from the vessel or from the warehouse, as the case may be.

Q. Then on the 1st day of July all the cases mentioned in the amended entry, except whatever may have been ordered to public stores, were delivered to the merchant?

A. Virtually.

93 Q. The duties were paid on the 25th of July.

A. No, sir; I do not say so. The duty was paid on the 1st day of July—the original duty.

Q. The original duty; but the additional duty of 5 per cent. was paid on the 25th of July, was it not?

A. Apparently on the 25th of July.

Q. Is there anything on that amended entry, Mr. Smith, to show when the package or packages that went to the public stores were delivered?

A. No, sir.

Q. You examined the entries yesterday, or I think a large portion of them, submitted to you while you were on the witness stand. Is there anything on those entries to indicate when the goods are delivered?

A. Yes, sir; in part.

Q. From the public store?

A. Yes, sir. [The entry by the Arago Exhibit 2 handed to the witness.]

The witness. I cannot answer from that entry when it was delivered. I will state the reason why if you desire it.

By the COURT. That is not an amended entry.

A. No, sir.

By DEFENDANTS' COUNSEL. (Q.) I show you Exhibit No. 3, by the Trenton, and ask you the same question concerning this exhibit. Does that show when the goods were delivered?

A. That entry you just showed me?

Q. Any of the goods?

A. No, sir; it does not show any. The question put to me, does that entry disclose what time the public store packages were delivered.

94 I answer no, it does not.

Q. And then I asked you if it showed when any other cases mentioned on the entry were delivered.

A. It don't establish any facts at all.

Q. Does it show when the packages sent to the public stores were delivered?

A. My answer to this is that possibly——

Q. Not possibly. Does it show when the packages sent to the public store were delivered. Yes or no?

A. It does not.

The witness Smith further testified, on being shown each of the other entries of Exhibits 4 to 62 both inclusive, that there was nothing on any of such entries that showed the date of the delivery of any of the packages. That he was familiar with the course of procedure and records at the custom house; that the record of delivery of goods is shown in the delivery order which should be on file in the storekeeper's office at the appraiser's store.

By the PLAINTIFFS' COUNSEL. (Q.) The delivery order for goods that are sent to public stores?

A. Yes, sir.

By the DEFENDANTS' COUNSEL. (Q.) Do the invoices show, Mr. Smith, the date of delivery of any of the packages?

A. Not the precise date; no, sir.

Witness, on being shown one of several books, testified that he knew what it was. That it was a book that was kept at the United States appraiser's stores, regarding goods. That it contained a record of all goods received at the appraiser's stores, showing the date of the delivery,

95 and to whom delivered.

Q. That is a record where such dates were kept?

A. Yes, sir.

Q. Are you familiar with such a paper as the inspector's return?
A. Quite so.
Q. What does that show?
A. The inspector's return shows, or should show, all packages that may have arrived by a vessel, what has become of them, where they have gone to, such as may have been delivered to the merchant, such as may have been sent to the appraiser's store for examination, such as may have gone into the warehouse where the merchant has bonded his goods, and such as may have gone to the general order store where the goods had not been entered at all—go in there as unclaimed goods. So it shows four things.
Q. The date of delivery of the other packages and the examined packages?
A. It shows the landing, not the delivery. It will show the landing of the merchant's packages, such packages as were not ordered to the appraiser's stores for examination.
Q. Didn't you say it showed what became of them?
A. Yes, sir; they were landed on the dock, virtually delivered to the merchant; supposed to be delivered to the merchant when landed on the dock.
Q. It shows the date when they are landed?
A. It shows about the date. I would not swear positively, but
96 about the date.
Q. Where are those records kept?
A. On the inspector's return.
Q. At what place—the customhouse?
A. The return itself?
Q. Yes, sir.
A. The return itself is kept at the customhouse in the surveyor's office.
Q. Are you familiar with such a paper as a permit to deliver goods?
A. Quite so.
Q. What is it?
A. A permit for the delivery of goods is a customhouse document. I will take an entry here so that the jury can understand it. Here is an entry calling for 13 or more cases of goods. A permit is issued made out at the customhouse for thirteen cases of goods, giving the name of the vessel, and all that sort of thing. The collector designates one or more packages for examination. That permit then, after being completed at the customhouse—that is, having received every signature required—is placed on board the ship addressed to the officer. The permit reads: "To the inspector of customs: You will deliver the following goods imported by so and so except certain numbers," which are designated on the extreme right of the form, which numbers indicate to the officer in charge that those packages are intended to be sent to the appraiser's stores. That officer having received that permit transcribes it in his book. He indexes
it according to the letters called for on the form. In this case the
97 goods are marked G B C L. He would enter that on his index under G, and as each case came out of the ship he would simply see if 2076 was ordered for examination. If not, he would place it on one side of the dock for the merchant. If the next case, 2077 was a pack-

age to be sent to the Appraiser's stores, he would put a little ring around it in chalk, and lay it by itself, so as to keep the public store packages separate from the merchant's packages. By merchant's packages I mean such packages as are to be taken away by the merchant from the ship to his store direct. That is the nature of an inspector's permit.

Q. Is there any endorsement subsequently made on the permit, showing the date of delivery of those packages?

A. No endorsement whatever ever on the inspector's permit, unless in case of goods being sent to the warehouse under general order by reason of disagreement. For instance, a permit goes on board a ship for G, B, C, and the goods come out C, B, C. The officer, if he is disagreeable, can send those goods under general order, and state on his permit that those goods had been sent on general order as disagreeing with permit. That was the only endorsement ever made on the inspector's permit.

Q. What is the index to which you refer?

A. Oh, it is a little index kept in alphabetical order from A to Z, to facilitate the officer in the discharge of a vessel; so if a case comes out marked A, he simply turns to the letter A to see if that case has been permitted. If that case has been permitted of course it is delivered.

98 If it is not permitted it is laid on one side.

By a JUROR (Q). That is for his own convenience, is it not?

A. Simply for his own convenience, to facilitate him in the discharge of his duties.

By DEFENDANTS' COUNSEL. (Q.) The inspector's return is substantially a copy of the permit?

A. It should be. It is an official record.

Q. You have spoken about the entries and invoices that have been made from time to time in the customhouse, and you have spoken of the access that merchants had to them. Have you ever known merchants, or their attorneys, or their customhouse brokers, to take entries from the customhouse after they had been made?

A. Not to my knowledge; no recollection.

Q. Has your experience as a customhouse broker brought you in contact with books known as protest books?

A. I have seen such.

Q. Have you seen those protest books? [showing witness protest books.]

A. I have seen the protest books kept in the New York customhouse—many of them.

Q. Will you look at that protest book, No. 8, and see if you recognize that? [handing book to witness.]

A. I won't swear that I have seen that particular one, but that is one of many similar.

Q. I show you protest book No. 9?

A. That seems to be a copy of the protests.

Q. No. 7 I show you.

A. The same answer.

99 Witness made the same answer as to protests books No. 10 and 11.

Q. I show you No. 12.

A. This is the index. It is not a protest book.

Q. Isn't that a protest book? Let me call your attention——

A. This page of this book indicates that Giro & Francia on the 31st of December, 1860, filed a protest by the Zephyr on an article called almonds. No. 12170.

Q. Won't you state, Mr. Smith, what, if anything, you know about these protest books which have been shown you, Exhibit No. 12.

A. I want to answer your question, but I would like you to ask it so I can understand it. Please ask your question again.

Q. Please state what, if anything, you know about these protest books, their origin, the manner in which they were kept, or anything of that sort.

A. I don't know anything about them, other than the fact that those are customhouse records. My intelligence tells me by looking at those books exactly what they are, and I have seen those books in the customhouse. Of course my intelligence tells me how they are kept—how they should be kept.

Q. You have no doubt they were kept at the customhouse?

A. I have no doubt, certainly.

The COURT. I think, Mr. Greenwood, this is not the witness to prove the books by.

By DEFENDANTS' COUNSEL (Q). I show you Exhibit No. 6, Mr. Smith, and call your attention to this patched and pasted document fastened
100 in the corner by a pin, and ask you if you ever saw that before.

A. I can not say that I ever saw this particular paper before yesterday in this court room.

He further testified that his experience with the customhouse ran back thirty-five years, and that during the past fifteen years at least he had seen many papers precisely similar and identical in every respect with protests, Exhibits 6, 11, and 13, at the customhouse pasted in that way to the entries and being part and parcel of the record.

Q. In the course of your business, did you ever make protests to the collector?

A. I have, very many of them.

Q. In 1857, 1858, 1859, 1860, and 1861?

Yes, sir.

Q. You were familiar with the Treasury regulations as to the making of protests?

A. From time to time; yes, sir.

Q. I show you articles 386 and 387 of Treasury regulations, issued February 1st, 1857, by the Treasury Department, and ask you if you ever saw those articles or the instructions contained in those articles 386 and 387?

PLAINTIFFS' COUNSEL. Suppose he has, then what? If he issued that circular, or if he is an expert to explain that—if it is not a book that speaks for itself, I suppose it would be proper for him to interpret it. It it is Treasury instructions, then let him read from the book here.

DEFENDANTS' COUNSEL, Will you admit that these are Treasury regulations, issued January 1st, 1857?

101 PLAINTIFFS' COUNSEL: Yes, sir; I haven't the slightest objection to his reading it if he wants to read it.

Defendants' counsel thereupon read in evidence Articles 386 and 387 of these treasury regulations:

"386. Protests are not to be written on the entry, but on a separate paper, to be marked with the number of the entry to which it belongs, and kept in a proper file arranged for that purpose.

"387. Whenever duties are paid under protests, collectors of the customs will have the protest carefully and accurately copied at length in a record to be kept for that purpose, properly compared, verified, and certified as a correct copy by the officer, or officers, making such comparison, the number and date of entry, name of importer, vessel, and description of merchandise in regard to which the protest is made, to be duly stated on the record for the purpose of identification. This precaution is deemed necessary as well for the protection of the importer as the United States, in the event of the loss of the original protest by accident or otherwise."

Witness Smith further testified on cross-examination that prior to February 1st, 1857, when these Treasury Regulations were issued, there were two practices as to making protests, one practice—and he did a great deal of it himself—was to write the protest on the entry, an ordi-

102 nary protest, taking exception to the rate of duty, and assigning sufficient reason. Another way was, and it was often used to save time, to write out the protest, the bulk of it, before the entry was made, the balance to be filled in and signed after the completion and when the proper time arrived to affix these protests to the entry. So that protests were made in two ways; sometimes on the face of the entry and sometimes they would write on a piece of paper separate from the entry, which paper was affixed to the entry either by wafer or gum, if one had any. After these Treasury Regulations of 1857 were issued that practice continued, and by that practice the witness stated he meant that after the issuing of these regulations, he did not pay very much heed to them, he continued to affix the protests to the entries, and they were received in the regular course of business. That he did not know what the general course of other custom-house brokers was; he had all he could do to attend to his own business at that time, and he pursued this practice that he had mentioned to economize time. That he could not answer the question whether the collector or any of his subordinates, after these Treasury Regulations were issued, ever refused to receive an entry to which protest were attached; that he could not say that he ever knew of their refusing to receive any such entry; that he believed the practice of attaching protests to entries, or writing protests upon the entry in the manner he had described, was at some time discontinued; that he did not recollect in what year that practice was discontinued.

103 Q. Within ten years?

A. I would not want to answer without being definite, and I cannot answer that question as to time.

Q. You are familar with the present protest law, are you not, section 2931?

A. Yes, sir.

Q. That was passed some time in 1864. Does that refresh your mind sufficiently to enable you to state whether the discontinuance of writing protests on entries or attaching protests to the entries by wafer or mucilage or otherwise was discontinued about 1864, about the time of the passage of the protest act.

A. About 1864 it may have been; I cannot answer definitely.

Q. Did I understand you that you recognized the writing of these importers, Fauche & Co?

A. Yes, sir; the writing of the clerk whose business it was——

Q. Not the signature?

A. No, what I call the endorsing clerk.

The witness, Smith, on redirect examination, on being shown the amended entry, Exhibit 1 and Exhibit 1 B, the naval office copy thereof, testified that the amended entry did not show any package that was sent to the public stores; that it did not show the package upon which the additional 5 per cent. was charged.

Q. Does not the naval office copy?

A. Do you mean upon the package upon which the additional duty was assessed.

104 Q. Yes.

A. No, sir; it does not show any packages by mark or number. There are no packages described on that piece of paper; there are no classes of goods described on that piece of paper, no marks, no numbers.

Q. Is there anything on the other?

A. No, sir.

Q. Only it was mousseline delaines?

A. That is all.

Q. Now, then, I will ask you in reference to the practice at the customhouse at that time—assuming that the public officer, the collector, did his duty, that he sent some package to the public store for appraisement—I will ask you in what way the package sent to the public store was obtained by the merchant on that amended entry? I ask you how the package sent to the public store in that case was obtained, after examination?

A. When an invoice was returned by the appraiser at a rate of duty in excess of what the duty was—of the estimated duty by the collector—that would create an additional duty. The duty returned by the appraiser was in excess of the duty paid to the collector; that entry would undergo what was termed an amendment, showing the difference between what was paid and what was due. After that entry was made up in the collector's office, of which this paper is a copy, it would then go into the naval office and they would examine it, and if it was found to be correct, they likewise would make a copy of it and check it the same as this is. After that was checked in both offices we then took it to the cashier's office and he

105 would make an abstract of it. We then would make a tender of the money, pay that duty, and the check, showing that the additional duty was paid in excess of what was originally paid, would entitle us to the packages, and we could not get those packages until we did pay it.

(The witness Smith, on being shown a book, and asked to describe it, testified that it was a storekeeper's delivery book—the receipt and delivery book, properly speaking—as, for example, stating the first entry on a certain page, it shows that on the 17th day of July a package marked L. F., 840, a case, was received. That package was received on the 17th of July; what the year was it does not show.)

Q. Is there anything in the book to show?

A. Probably the title page does; 1857 is on the book.

(Later, the witness, in answer to a question of defendants' counsel, testified that the book also showed that the same case which was stated as received on the 17th of July was delivered on the 20th of July to Lachaise, Fauche & Co., being one of the cases in suit.

The witness, in answer to a question by the plaintiffs' counsel, testified that he found on the 20th day of July there was a case, per the Anna Decatur, received by the storekeeper, marked G. B. C., 2072. That case was delivered, according to this book, on the 25th of July, to Lachaise, Fauche & Co.

The witness, in answer to a question by a juror, testified that there was nothing in the book to show what was in these cases.

106 The witness, in answer to a question by defendants' counsel, stated that the book did not show the date of the arrival by the vessel except inferentially; that the inference was that the vessel arrived on the 17th of July; that there was nothing authentic to establish the fact that that vessel did arrive on that day or when it did arrive.

The witness, in answer to a question by plaintiffs' counsel, testified that there was nothing on the amended entry to show when the vessel arrived, but that entry showed when the original entry was made; that the original entry was made on the first of July, and the duty was paid on the 1st of July; that there is no certification on the amended entry as to the actual date of arrival, but that there was no question that the vessel arrived on the first day of July or the 30th day of June; that the naval office copy of the amended entry shows that the original entry contained certain cases numbered 2069 to 2075.

Then the witness, in answer to plaintiffs' counsel, testified that the amended entry did not show the marks on the cases; that the storekeeper's books showed that there was a case received in that store by number 2072, marked G B C; that the entry does not show anything as to the receipt of the case by the storekeeper.)

The COURT. The original entry would show it, would it not?

The WITNESS. The original entry would show, and does show, but there is not room on this paper to go over all those particulars.

107 (The witness, in answer to a question put by plaintiffs' counsel, testified that Exhibit 1 B was a paper made by an employee of the naval office at the customhouse in the city of New York. That exhibit 1 was made in the collector's office likewise by an employee.)

By the COURT (Q). The two amended entries and the original would give you sufficient to identify the package, would they?

A. If I had the original entry I could tell it. In this naval office copy the man who made that out checked this duty [indicating], and the same man that made that out must have checked this [indicating].

(The witness, on being shown the entry of Exhibit 3, testified that that entry contained the consecutive numbers 2076, &c., beginning where the entry Exhibit 1 B ended, 2075, and going straight along.

The witness Smith being shown the entry by the Argo, Exhibit 2, and asked to see if the storekeeper's book showed that any of the goods mentioned therein were sent to public stores, testified that it did; that the case A L F 2056, was received at public stores on the 4th of August and was delivered on the 6th of August to Lachaise, Fauche & Co.; that that case by mark, and number, and importer appears upon that entry Exhibit 2.

The witness, in answer to defendants' counsel, testified that the entry showed other cases beside the one sent to the appraiser's stores, and in answer to plaintiffs' counsel that the case sent to plaintiffs' stores was one out of many and was delivered August 6th, and that the duties
108 were paid on the 29th day of July, 1857.)

John V. Van Arsdale, being called by the plaintiffs as a witness in their behalf, and being duly sworn, testified that in answer to a subpœna duces tecum served upon the collector, he had produced the cashier's books kept at the customhouse, showing the payments of duties on August 20th, 1858, and on September 18, 1858, first, by the Arabia, by Lachaise, Fauché & Company; that the amount of duty paid in the case of the Arabia was $1,246.01, and it was paid on August 20, 1858, and that on looking at the naval office copy of the entry by the Arabia (Exhibit 61) he testified that the amount of duties shown by the cashier's book to have been paid corresponded with the amount called for on the naval office copy; that he found in the cashier's book that Lachaise, Fauché & Company had paid upon importations by the steamer Persia, September 18th, 1858, $2,752.06, and that amount corresponded with the amount of duties called for on the naval office copy of the entry by the Persia (Exhibit 62).

The witness, in answer to defendants' counsel, testified that the amount of duties shown by the cashier's book to have been paid in the case of the Persia was the whole amount paid, and that the amount of duties shown by the cashier's books to have been paid in the case of the Arabia was the whole amount of duties paid; that in the case of the Persia the goods were silks and mousseline delaines, and in the case of the Arabia there was a variety of articles of different kinds.

109 The witness Van Arsdale further testified that in answer to the subpœna he had brought the naval office copy of the entry by the Anna Decatur, of July 1st, 1857, Exhibit 1, and the manifest; that he found by the manifest of the Anna Decatur, certain goods consigned to Lachaise, Fauché & Company—eighteen cases marked L F, 830 to 847; also cases marked G, B, C, 2069 to 2072, and two cases H, S, D, 2073 to 2075—twenty-five cases in all; that the officer's return shows that the cases G, B, C, 2069 and 2072 were sent to the public stores, and on the margin of the return it says G, B, C, 2069 and 2072 not found, but the same numbers G, B, C, found and sent under general orders. That when he had previously said public stores he meant general order, and it was so sent July 13, and 17, 1857; that he meant by goods going under general order that the goods discharged from the vessel before the merchant had made his entry of them and got a permit to land them, and that under such circumstances they would go to the general order store nearest to the vessel; that the general order store was not the same thing as the appraiser's store; that the general order store is in the custody of the collector, the same as a bonded warehouse; that the merchant got his packages from the general order store on a general order permit when he paid his duties; that the permit goes to the storekeeper of the general order store for the delivery of the goods the same as a permit would go to the inspector for the delivery of goods from the vessel.

110 The witness, in answer to the defendants' counsel, testified that before the importer could get his goods from the general order

store he must pay the duty and storage, and in addition give a ten day bond required by the statute; that unless he gives such ten day bond in addition he can not obtain the packages from the general order store until after the examination and appraisal of the package or packages sent to the appraiser's stores for examination and appraisement.

John D. Bluxome, being called as a witness on behalf of the plaintiffs and duly sworn, testified that he was a customhouse broker and engaged in the bonded storage business and had been so engaged in the city of New York since 1856, and in the brokerage business since 1872; that his father, I. Bluxome, was a member of the firm of Schuyler & Bluxome; that Mr. Schuyler and Mr. Bluxome were both dead; that Mr. Bluxome died in October, 1862; that Schuyler & Bluxome were succeeded in business by I. Bluxome & Company, consisting of I. Bluxome and Christopher King; that Mr. King died in 1860 or '61; that after Mr. King died, the witness and his brother Francis were associated with his father in the brokerage business; that after Mr. King died, witness and his brother were united with his father in conducting the customhouse brokerage business, together with the bonded storehouse; his brother Francis attended with his
111 father to the customhouse brokerage business, and he attended to the bonded storage business; that his brother Francis died in 1872, and that witness had nothing to do with the customhouse brokerage part of the business until 1872 when his brother died; that all who were in his concern who were familiar with the entries made by Schuyler & Bluxome or by I. Bluxome & Company in 1857 were dead; that he did not recognize the handwriting on Exhibit No. 2 and could not identify the same.

Amos A. Smith, recalled as a witness in behalf of the plaintiff, further testified that he had seen protests in his office like the pasted protest attached to Exhibit No. 6, and consisting of two parts; and that he had seen such protests attached to entries where the question of mousseline delaines was involved. The witness on being asked under what circumstances he had seen such protest in his office, answered, by reason of their being two distinct and separate issues involved in these protests, so that when he had an entry in which these two distinct and separate issues were involved; these protests were pasted together, that is, two different and separate pieces of paper were pasted together, and affixed to the entries in which these issues were involved. That the reason of pasting two such pieces of paper together was to save time and labor, and it was a convenience to the importer as well. That there were times when he was very much hurried as a customhouse broker in passing entries at the customhouse. That on some days he had passed fifty-five, sixty or sixty-five a day.
112 That he first saw such protests, as the pasted protest of Exhibit 6, at the time the issue was raised as to whether mousseline delaines were subject to duty at the rate of 19 per cent. or of 24 per cent. ad valorem.

That that was during the years the Department decided that this class of goods were subject to a duty of 24 per cent., and that by referring to his books he found that that was about the years 1857 to 1861.)

Q. I will ask you if there was any way, and, if so, what way, for the merchant to get possession of the examined package of his goods without paying any additional duty that had been imposed in consequence of the

change in the rate, or amount of duty upon liquidation of the entry after the appraiser had passed the invoice?

(To this question defendant's counsel objected, first, on the ground that it was leading; and second, that no proper foundation had been laid for the question. The court overruled his objections, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed. Witness then answered "there was no way.")

Q. You stated that on refreshing your memory since last Thursday you could go back fifteen years further, to the time that this mousseline delaine issue was raised; and that you have seen pasted protests consisting of two distinct and separate protests pasted together. Did you not so state?

A. I made that answer.

113 Q. How were these protests made? Which came on top, and which at the bottom?

A. I can not answer that clearly now. That is going back a good many years. I know that there were two separate pieces of paper originally, and when an issue was raised on an entry, where both issues that were involved in those two protests were applicable to the entry in question, they were then attached; that is, the protests were pasted together, whereby it became one paper, and was affixed to the entry for the convenience of the importer.

Q. That was, I suppose, to save trouble, by fastening the two protests to the entry?

A. It saved labor, and saved two signatures of the importer; and it only took one wafer to fasten it to the paper, and so saved time and labor; and further, there was more liability of two protests being lost, if detached, than if they were attached to one paper.

Q. Did you ever serve any such protest on the collector?

A. I have affixed them to the entries.

Q. What did you do with them?

A. They then became part and parcel of the entry. When the duties were paid that protest was fastened to the entry.

(This witness on cross-examination further testified: That when such protest had been attached to the entry he did not present it to anybody or call anybody's attention to it. That the practice of pasting the protests on the entries and handing them in without calling attention to

114 them prevailed at that time; that the protests so fastened to entries were presented to the collector's office, and was fastened on the entries when the entries were presented to the cashier for payment of duties; that the protests were fastened to the entries in that way when the entries left the witnesses' broker's office; that he was talking about his own practice and did not know anything about anybody else's practice; that in his office he made out the entry from the invoice and then was accustomed to fasten on the entry the protest; that then he took the entry, with the protest so fastened, and the invoice to the customhouse, that then the entry, with such protest so fastened, was first presented to the entry clerk of the collector's office; that the entry clerk then took such entry and passed it; that he made out the permit, and completed it, and did all that he had to do with it; that then the entry clerk handed it back to the witness; that was the practice in 1857, although the practice is now different; that after the entry clerk did his work the entry was handed to

his broker or his clerk, and then he took it to the naval office, and the naval office clerk, who is known there as the entry clerk, did precisely what the collector's office had done; that it was the business of such entry clerk in the naval office to countersign and approve all that transpired in the collector's office. After that was done the entry was taken to the deputy collector to be sworn to. When the entry was sworn to it was then taken to the bond desk. After it left the
115 bond desk it was taken by the broker or his clerk to the naval office cashier to be checked for duty; that it was the duty of the cashier in the naval office to simply transcribe on a sheet of paper the duty that was found upon the entry, and when properly checked he retained the naval office copy; that the broker then went with the entry to the cashier's office and paid the duty, and the cashier retained the entry, the protest being on the entry all the time. The cashier returned the permit and the invoice to the broker. The broker had the permit signed in the two different departments, and he then placed this permit on board the ship or at the store, wherever the cases of goods mentioned in the invoice might be. Sometimes they were under general order—sometimes on board the ship; that the invoice was then taken over to the appraiser, and the appraiser passed the case as soon as it reached the store; that when the appraiser made his return on the invoice the invoice came back to the customhouse, and, providing there was a difference in the rate of duty, or in the calculation as between the appraiser and the entry clerk, or the amount estimated by the collector and paid, it was the business of the entry clerk to find out what it was and to note it in the shape of an amendment to the entry; that that same process was gone through with in the naval office, and whatever the amount was it was paid on the amended entry; that after the additional duty was paid it was noted on the invoice, the same as shown in Exhibit 52 about which witness had testi-
116 fied; that the invoice was then taken to the order clerk, and it was his business to issue an order for the delivery to the importer of the particular case or cases, that had been sent to the appraiser's stores for examination. That the duty having been paid the entry was left with the cashier, and by him transmitted by his own messenger to the impost room. That after it had been to the impost room, it went to the auditor's office for endorsement; that the endorsement was made by the endorsing clerk in the auditor's office; that after this endorsement was made the entry went to the liquidating department to be filed away by the vessel. That he did not know whether or not the entry clerk was authorized by Collector Schell to receive protests made to Collector Schell, against duties exacted by him. That he did not know whether the cashier or the deputy collector, or whether anybody in the customhouse during the years in which the importations in suit were made, was the authorized agent of the collector to receive such protests. That in the early part of 1857 and 1858 there was nobody at the customhouse whose duty it was, or at least who was assigned to the care of protests; that protests were simply fastened promiscuously to the entry, and such may have been the custom in 1859, although he could not say definitely. That he spoke generally as to 1857 and 1858, and it may have been so as to 1859; that he could not say; but at that time or about that time there

was no clerk in the customhouse assigned or recognized as the protest clerk to take charge of or custody of protests. That he did not know of any
117 one or remember of any one in the customhouse authorized to do so in 1859. That the method at the present time is to serve the protest on the collector in duplicate; that all protests must be filed in duplicate, addressed to the collector and deposited in a box for that purpose, and that this course was pursued by order of the Department, promulgated through the collector, so that the instructions or rules of the Department now as to serving protests are entirely different from what they were in 1857, 1858, and 1859. That he thought that the present rule for serving protests by depositing them in the protest box had been adopted for about three years; and more than that, that it had been going on, he thought, fifteen years anyway. That he had so few protests now to serve that he did not deposit them in the box, but he believed there was a party who was delegated by the collector to receive them. That he had seen pasted protests of the character of the protests attached to Exhibit 6 in the course of liquidation of entries many times. That he had seen them while searching the records at the customhouse for information bearing upon importations with which he was connected as a customhouse broker. That as such broker he had the privilege of going to the records under the supervision of an official of the customhouse; that anybody, any responsible party, making application was permitted to see them, under the supervision of the officer in charge; and that the same privilege is still accorded now, as it always has been.

118 Q. You stated this morning something about paying duties in connection with getting possession of the goods. In 1857, 1858, or 1859, did you pay the duties on the day that you presented the entry, and did you get your goods on that day?

A. Sometimes, yes; sometimes, no.

Q. Simply by paying the duties and doing nothing else?

A. Of course the payment of the duties carried with it the issue of a permit to the party paying the duty. That permit, when presented to the ship (providing the goods were on dock or unladen from the vessel) would necessarily carry with it a delivery of those goods.

Q. Did you have anything else to do to get those goods?

A. All goods are delivered upon the payment of additional duties.

The COURT. You are not speaking of the examined goods?

DEFENDANTS' COUNSEL. I am speaking of the first payment.

The WITNESS. The first payment carried with it the delivery of the goods. The permit calls for that, except as to such packages as may have been ordered to the public stores.

Q. But, as far as the permit is concerned, does the payment of duties alone entitle the importer to his goods?

A. Certainly it does.

Q. Does he not have to give a ten-day bond? Did he not have to do so then?

A. A man cannot pay his duties until he gives his bond. The
119 bond precedes the payment. He cannot pay the duties until after he gives the bond. The bond was known as a penal bond, and required the importer to deliver to the collector, subject to certain conditions

all of the cases under general orders or in the public stores for examination. The bond obligates the importer to deliver all the goods mentioned therein to the collector, or all that the collector should want, within ten days from the examination of the public store package; that it was not optional with the importer to give or not to give that bond; that he was obliged to give it, and that be could not get his goods unless he did; that whether he wanted to or not, he had to give the bond.

The witness on being asked whether he had refreshed his memory about the protest books to which his attention was called on a previous day, stated that he had not since given them a thought, and that when he left the courtroom he had dropped the whole matter.

The witness on re-direct examination testified, that in case of an invoice of one package only no penal bond of the kind that he had described was required by the collector. That that package goes to the public store for examination; that when there was more than one package mentioned in the invoice it was sometimes the practice to send all the packages mentioned therein to the public stores for examination. That when the entry is presented to the deputy collector to select such packages as he may be pleased to send to these stores, he sends one anyway, and sometimes two, and sometimes all. That if witness should go
120 to the collector and say to him that he would like to have such and such a package of an invoice sent, the collector would send those packages which witness asked him to send, and he would also select what other packages he—the collector—desired. That the broker or importer had no right to dictate to the collector, or to tell him what he wished him to do. That if the collector were asked to send a certain package for good and sufficient reasons, he would send some other package as well; not only the one that he had been asked to send, but some other one. That if there was any question involving the rate of duty on a particular package the importer might not know at the time what the correct duty was.

By the COURT (Q.). You have stated, in 1857 and 1858, and perhaps in 1859, you knew of pasted protests going to the collector, or of protests being served in that way. Did you know, during that period, of any protests being served in any other way?

A. No, sir; that was the invariable practice.

PLAINTIFFS' COUNSEL. Does your honor mean to confine the inquiry to pasted protests, or to any protests?

The COURT. To any protests, pasted or fastened on the entry.

The WITNESS. As far as my knowledge went, all protests, so far as any protests have passed through my office, were fastened to the entry—or written on it.

By the COURT (Q.). But they were all on the entry?

A. They were written on or attached to the entry.

121 By DEFENDANT'S COUNSEL (Q.). And you know of protests being made in no other way during that period?

A. I do not.

Q. I show you Exhibit No. 32; see if among those papers you find a protest.

A. I find a protest. I have it here.

Q. Does that appear to have been fastened with the entry?

A. Apparently not.

Q. I understood you to say that you did not know of the practice of filing or serving such protests as those.

A. In my office?

Q. Did you in anybody else's office?

A. I could not say as to anybody else's office. My information, which I have given, is confined to the practice which prevailed in my office.

By the COURT (Q.) You do not know that anybody else did it.

A. I do not know of anybody else that did it.

Q. Did you have your attention called to the endorsement on the protest the other day?

A. I do not think I did; I do not remember.

Q. Do you know in whose handwriting it is?

A. I do not.

Q. Or any part of it?

A. No, sir.

122 John Van Arsdale, being recalled by the plaintiffs in their behalf, testified that under a subpœna duces tecum served upon the collector he had produced the collector's order book, showing the orders made by the collector for the guidance of merchants, customhouse clerks, and brokers in the conduct of business in the custom house from about August 7, 1845, to April 22, 1879.

Mr. GRISWOLD. I ask the counsel on the other side whether it is conceded that the duties on these entries were paid on all the entries that we have put in here?

The COURT. The entries themselves are in. Upon the face of each entry there is a memorandum, giving the date and "pd.," a dollar mark, and an amount, and some initials. As to the first one of these entries there is testimony of a witness to the effect that he knew the signature, that it was the official signature of the clerk who was in the cashier's office in the customhouse at the time, and whose business it was to receive the money, and to make that entry. It is conceded, as to the other entries, that similar memoranda upon them were made by a like officer. Is not that so?

Mr. GREENWOOD. Your honor has held, as I understand it, that those endorsements show the dates of payments?

The COURT. Yes; in the absence of any proof to the contrary?

Mr. GREENWOOD. I do not know that we have any proof to the contrary; but if we have we will put it in. I want my friend to

123 understand that we desire to be entirely fair about it. If we have any evidence, and I do not know that we have any, showing a different state of facts we will produce it.

The COURT. Then the simple concession is that all those receipts, purporting to be payments endorsed upon the face of the entry were made by the proper official in the customhouse?

Mr. GREENWOOD. That is all, and that shows the date of payment, and the amount. If we have anything which shows to the contrary, we will produce it; but I do not now know that we have any such evidence.

Joseph Treloar, being produced as a witness on behalf of the plaintiffs,

and duly sworn, testified that he was at present chief clerk in the New York customhouse; that he had been in the customhouse of New York for thirty-three years. That as far back as 1857–'58–'59 he was only partially in a position to know the routine of business in the customhouse so far as the administration of its affairs were concerned. That he knew of no one at this time who was familiar with the routine of said business at that time. That Mr. Samuel Ogden was dead. That Collector Schell was also dead. That he could not recall any of Collector Schell's deputies from 1857 to 1861. That Mr. Clinch was Mr. Schell's special deputy; that Moses F. Odell was not a deputy. That he knew of no one who was such deputy.

124 The witness, on being shown the collector's order book, testified that he had seen the same almost daily for thirty years past; that it was a record of the orders issued by the collector of the port of New York for the guidance of his assistants, and for the general transaction of business; that it was supposed to contain a record of all the important orders that were so issued; that he had looked in it for an order requiring the importers to file their protest separate from their entries in 1857, '58, & '59, and had failed to find it; that in 1857, '58, '59, '60, & '61 the protests that were made at the customhouse did not come before him as a rule, and therefore he had no knowledge as to how they were lodged or where they were placed; that the general knowledge of the witness of the internal workings of the customhouse as to the making of protests began, he should say, in 1870; that he knew of no one in the customhouse who would know how protests were made in 1857 to 1861, and that he could think of nobody, except it might be some of the old customhouse brokers, so-called, would know; that Gray & Garvin were brokers who had been in business a long while; that W. W. Thomas & Co. had been in the brokerage business a great many years; that Wood, Niebur & Co. had been in the same business for a number of years; that he had seen what purported to be a signature of Howell Cobb, but that he had never seen him write. The witness on being shown a letter dated February 17, 1859, and asked if the signature to it was that of Mr. Cobb, testified that, as far as the form
125 of the signature that was accepted as his goes, he would say that it was Mr. Cobb's official signature at that time.

The witness made the same answer as to the signature of a letter of March 5, 1857, and as to the signature of a letter of August 16, 1858. Thereupon the letters were respectively marked Exhibits 67 and 68 and 69 for identification.

The witness Treloar, on cross-examination, testified that in 1857–58, & '59, he was a clerk in the correspondence bureau of the customhouse, and had been in that bureau ever since; that the collector's order book which had been shown him, did not contain original letters, orders, or instructions, but copies thereof; that the originals thereof might be on file at the customhouse—that they should be; that he would not like to answer that they were on file; that so far as he knew to the contrary they were.

The witness, on being asked whether at the time the Treasury regulations of February 1, 1857, were issued, he was familiar with those regulations then and thereafter, answered that they were a public document; that he did not know about the word "familiar;" he knew of their existence;

that he had seen them many times; that he had frequent occasion to refer to them for his guidance and the guidance of others in the customhouse.

Witness, on having his attention called to paragraphs 386 and 387 of these regulations, testified that he had seen those paragraphs before repeatedly; that he would not want to say he had seen them in 1857;
126 that he could not say he had in 1858; that he would not like to designate any particular year when he had seen them. That about 1859 he was a subordinate clerk. That he did not know whether the instructions contained in those paragraphs were carried out by the collector. That he did not know whether the collector had ever issued instructions to his subordinates to conform to the Treasury instructions contained in those paragraphs. That he never saw a protest book at the customhouse in 1857 or 1859. That he never saw a protest book relating to the years 1857 to 1859. That he had seen protest books for subsequent years. That he never had had occasion to look into protest books before that time. That he did not know who had kept the protest books in the years 1857–58 and '59, but it had come to him by hearsay that a gentleman by the name of Philander Hanford had kept them. That he did not know whether Mr. Hanford was still living or not.

By the COURT (Q.). If you looked through the book to find a particular order you found it, did you not?

A. That is right.

Q. Did you ever look through that book to find if there was an order calling the attention of subordinates to the regulations of February 1, 1857, and requiring obedience to them?

A. I looked through the book for any order that had reference to protests in those years, and failed to find any order relating to protests in any shape or form.

Q. Did you look through the book to ascertain whether there was an order of the collector not enumerating the provisions of the reg-
127 ulations of February 1, 1857, and calling the attention of the deputies to the book, and informing them that they must be guided by this section?

A. I did not.

Q. You did not look for any such thing?

A. I did not, sir.

The witness further testified in answer to defendants' counsel that from his connection with the correspondence bureau at the customhouse in 1857 and 1858, and from his acquaintance with the practice of conducting the business of the customhouse at that time, he had every reason to believe that a copy of those regulations was furnished to the head of every division. That he did not know whether the attention of the subordinates was called to these regulations or not.

In answer to the plaintiffs' counsel the witness testified that after examining the collector's order book between January 1, 1857, and January 1, 1860, that he was not able to find any order calling attention to the regulations relating to protests.

The witness in answer to the defendants' counsel, testified that it was possible that there might be such an order in some other book or on file at the customhouse. That the Treasury regulations of February 1, 1857,

contained various instructions to collectors of ports as to procedure in business, and as to the mode in which their business should be conducted, and he was not aware that it was the custom in 1857, 1858, and 1859,
128 for the collector to issue an order that instructions from the Treasury Department to him should be carried out; that, guided by his present understanding, he should say that the collector would not deem it necessary to instruct his assistants that they should be guided in the transaction of business by these instructions; that they would be so guided without a special order from the collector as a matter of course. It was not customary for collectors to make orders directing their subordinates to carry out the instructions of the Treasury Department; it was not a general practice. That if it was found that the subordinates were disregarding such instructions the collector might then call special attention to the part of the instructions they were disregarding by a special order from himself. Judging from his experience in such matters, the collector, if he deemed it of special importance, might issue an order to his subordinates to carry out these instructions; otherwise, not.

Plaintiffs' counsel then offered in evidence nine answers to appeals in case of importations in suit made by the plaintiffs' firm, as an admission that at the time those appeals were answered the Secretary of the Treasury was informed by the collector, or the collector admitted, the filing of the protests.

To the admission in evidence of each of these nine answers the defendants' counsel objected, on the ground, first, that it was incompetent and immaterial, and second, that it referred in terms to the protest act of 1857, not to the protest act of 1845, which applies to the importations
129 in suit. The court overruled these objections and stated that he would admit them in evidence for what they were worth. To this ruling of the court the defendants' counsel excepted, which exception was duly noted and allowed; and the said answers were admitted in evidence and marked Exhibit 70 to 78, both inclusive.)

Ex. 70—Oct. 25, '87.

TREASURY DEPARTMENT,
August 25, 1858.

Your appeal, under date of the 24th inst., taken from the decision of the collector of customs at New York, subjecting to duty at the rate of 24 per cent., under Schedule C of the tariff act of March 3, 1857, mousseline delaines imported and described as follows, viz:

Per	S. S.	Vanderbilt,		Augt.	3, '58,	L F	2397–2402	6c.
"	"	"		"	"	"	2426–2428	3
"	"	"		"	"	"	2429–2431	3
"	"	Persia		"	5, '58,	J H	575–576	2
"	"	Arago		"	10, '58,	"	577–578	2
"	"	"		"	"	S A D	12–13	2
"	ship	Galena		"	11, '58,	L F	2319–2363	45
"	"	"	"	"	"	"	2381–2390	10
"	"	"	"	"	"	"	2391–2393	3

Per ship Galena "	Augt. 11, '58,	L F	2394–2396	3
" str. Saxonia "	" 20, '58,	"	2472–2477	6
" " Arabia "	" "	J H	579	1
				86

130 is received, and you are hereby informed that the decision of the collector is affirmed.

I am, very respectfully,

(Signed) HOWELL COBB,
Secretary of the Treasury.

Mess. LACHAISE FAUCHE & Co., *New York.*

EX. 71.—Oct. 25, '87.

TREASURY DEPARTMENT,
September 20, 1858.

Your appeal, under date of the 18 instant, taken from the decision of the collector of customs at New York, subjecting to duty at the rate of 24 per cent., under Schedule C of the tariff act of March 3, 1857, mousseline de laines, imported and described as follows, viz:

J H,	580, a 582,	3 c.	per str. Ariel,	Aug. 27, 1858.
L F,	2,496, a 2,497,	2 c.	" Alps, " 28,	"
"	2,416, a 2,427,	10 c.	" ship Zurich, Sept. 11,	'58.
"	2,434, a 2,471,	38	" " " " "	"
"	2,505, a 2,508,	4 c.	" Persia, " 18,	"

is received, and you are hereby informed that the decision of the collector is affirmed.

I am, very respectfully,

(Signed.) HOWELL COBB,
Secretary of the Treasury.

LACHAISE, FAUCHE & Co., *New York.*

131 EX. 72—Oct. 25, '87.

TREASURY DEPARTMENT,
March 17th, 1859.

Your appeal, under date of the 10th instant, taken from the decision of the collector of customs at New York, subjecting to duty at the rate of 24 per cent., under Schedule C of the tariff act of March 3, 1857, mousseline de laine imported and described as follows, viz:

Feb'y 1, '59, per "New Orleans"		L F	2530–2538	9
			2542–2587	46
" " " " "		J H	659	1
" " " "Arago" "		L E & C V	104	1
" " " " "		L F	2655–2656	1
" 3, '59, " "Wm. Tell"		L F	2588–2628	41
			2633–2637	4
		M L H	2629–2656	28
				131 cases.

Feb'y 11, '59, per "Zurich"	L F 2644–2662	18
" 18, '59, " "Lebanon"	L F 2663–2668	5
	2672–2676	4
" 22, '59, " "Africa"	J H 664–667–668	8
" 26, '59, " "Fulton"	J H 668 BIS	1
March 7, '59, " "Jura"	L F 2677–2685	8
		44

is received, and you are hereby informed that the decision of the collector is affirmed.

I am, very respectfully,

(Signed) HOWELL COBB,
Secretary of the Treasury.

Messrs. LACHAISE, FAUCHE & CO.,
New York.

132 EX. 73.—Oct. 25, '87.

TREASURY DEPARTMENT, *May 10th*, 1859.

Your appeal, under date of the 18th ultimo, taken from the decision of the collector of customs at New York, subjecting to duty at the rate of 24 per cent., under Schedule C of the tariff act of March 3, 1857, mousseline de laines imported and described as follows, viz:

April 1, 1859, Alps, L F, 2686/2706;
" 13, " Corinne, L F, 2638/2643;

is received, and you are hereby informed that the decision of the collector is affirmed.

I am, very respectfully,

(Signed) HOWELL COBB,
Secretary of the Treasury.

LACHAISE, FAUCHE & CO.,
Per W. H. DICKINSON,
Atty., New York.

EX. 74.—Oct. 25, '87.

TREASURY DEPARTMENT, *May 18th*, 1859.

Your appeal, under date of the 9th inst., taken from the decision of the collector of customs at New York, subjecting to duty at the rate of 24 per per cent., under Schedule C of the tariff act of March 3, 1857,
133 mousseline de laines imported and described as follows, viz:

April 26, 1859, per Jura, 15 cases, marked L F, Nos. 61 a 75,

is received, and you are hereby informed that the decision of the collector is affirmed.

I am, very respectfully,

(Signed) HOWELL COBB,
Secretary of the Treasury.

LACHAISE, FAUCHE & CO.,
Per W. H. DICKINSON,
Atty., New York.

Ex. 75.—Oct. 25, '87.

TREASURY DEPARTMENT,
September 3rd, 1859.

Your appeal, under date of the 1st inst., taken from the decision of the collector of customs at New York, subjecting to duty at the rate of 24 per cent., under Schedule C of the tariff act of March 3, 1857, mousseline de laines imported and described as follows, viz:

August	3,	1859,	per Ocean Queen,	L F	201 a 224;
"	5,	"	" Wm. Frothingham,	"	160 a 169;
"	16,	"	" Vanderbilt,	J H	745 a 747;
				"	749 a 751;
				L F	234 a 235;
				"	240 a 258;
"	24,	"	" F. B. Bartram,	"	181 a 183;
				"	184 a 200;

134 is received, and you are hereby informed that the decision of the collector is affirmed.

I am, very respectfully,
(Signed) P. CLAYTON,
Acting Secretary of the Treasury.

LACHAISE, FAUCHE & CO.,
Per W. H. DICKINSON,
Atty., New York.

Ex. 76.—Oct. 25, '87.

TREASURY DEPARTMENT,
September 29, 1859.

Your appeal, under date of the 28th inst., taken from the decision of the collector of customs at New York, subject to duty at the rate of 24 per cent., under schedule of the tariff act of March 3, 1857, mousseline de laine imported and described as follows, viz:

Sept. 25, 1859, per "Vanderbilt," L F 292 a 308=17c.;
" 309 a 310=2c.;

is received, and you are hereby informed that the decision of the collector is affirmed.

I am, very respectfully,
(Signed) HOWELL COBB,
Secretary of the Treasury.

Messrs. LACHAISE FAUCHE & CO.,
Per W. H. DICKINSON,
Atty., New York.

135 Ex. 77.—Oct. 25, '87.

TREASURY DEPARTMENT,
October 31st, 1859.

Your appeal, under date of the 29th inst., taken from the decision of the collector of customs at New York, subjecting to duty at the rate of 24

per cent., under Schedule C of the tariff act of March 3, 1857, mousseline de laines imported and described as follows, viz:

September 26th, 1859, per "Vanderbilt" L F, 292 a 308;
" 309 a 310;
October 17th, 1859, per "Africa" L F 321 a 333;
October 26, 1859, per "Ocean Queen" L F 343 a 363;

is received, and you are hereby informed that the decision of the collector is affirmed.

I am, very respectfully,
(Signed) HOWELL COBB,
Secretary of the Treasury.

Messrs. LACHAISE, FAUCHE & Co.,
Per W. H. DICKINSON,
Atty., New York.

136 EX. 78.—Oct. 25, '87.

TREASURY DEPARTMENT,
January 5th, 1860.

Your appeal, under date of the 4th inst., taken from the decision of the collector of customs at New York, subjecting to duty at the rate of 24 per cent., under schedule C of the tariff act of March 3, 1857, mousseline de laines imported and described as follows, viz:

Decr. 9, 1859, per steamer "Persia," from Liverpool, L. F. 364 & 401—J. H. 804 & 808.

Decr. 17, 1859 per steamer "Bremen" R$\underset{m}{\triangle}$8, 1890, is received, and you are hereby informed that the decision of the collector is affirmed.

I am, very respectfully,
(Signed) HOWELL COBB,
Secretary of the Treasury.

Messrs. LACHAISE, FAUCHÉ & Co.,
per W. H. DICKINSON,
Atty., New York.

Plaintiffs' counsel then stated that the plaintiffs did not seek to recover the following amounts of duty paid in case of the following importations: $55.20 by the Ocean Queen (Exhibit 43–a), $67.20 by the Vanderbilt (Exhibit 45), $16.60 by the Ariel (Exhibit 52), amounting in all to $139.

137 I. Augustus Stanwood, being then recalled as a witness in behalf of the plaintiffs, testified, that after making this deduction of $139 from the principal sum testified to by him as the difference between 19 % and 24 % duty exacted on mousseline de laines in suit, the amount of the principal was $18,521.70, that interest thereon at 7 % until December 31, 1879, was $26,331.92, that the interest thereon from the last mentioned date at 6 % until the present time was $8,583.06, making the total amount of principal and interest, $54,436.68.

The defendants' counsel then called John V. Van Arsdale as a witness in their behalf, who, being duly sworn, testified, on being shown certain books that he had seen them before; that they were protest books; that

he had brought them to court from the customhouse under a subpœna duces tecum issued by plaintiffs' counsel to the collector, requiring the collector to bring them to court. That he had known of these books a great many years, he guessed for twenty. That they were a part of the records of the customhouse, and had always been known to him as protest books. The witness, on being shown volume 6 of protest books, was asked to look at the first leaf, and being asked to state to the court and jury how that book was kept, said it was indexed under the importers' name, and there were certain numbers referring to protests on the pages. That on looking at page 1 of the book, he found a protest of Roberts & Williams of February 23, 1857; the amount of duty paid on the importation referred to in the protest was
138 $9,918.60; that the protest made by that firm was written out at length; that it gave the name of the importers Roberts & Williams; the name of the vessel, the Rapper of Cardinas, the date February 23, 1857, and opposite to these entries on the same page appears the protest written out, out, and it is numbered No. 1; that that protest was made by the importers mentioned in the case of the importations by the vessels mentioned; that following this protest is another protest No. 2, by different importers; that this protest No. 2 was followed by another protest No. 3, and that similar entries as to protests then followed up to No. 89, being 89 different protests made by different parties, and each of a different form from the other.

The witness testified, on looking at page 36, which is the page immediately following the page on which is written the protest No. 89, that on the first line of page 36 was the name of an importer, the name of the vessel, the date of arrival, and the amount of duty claimed by the importer in the case of that importation, and that opposite these entries is this entry: "The protest the same as No. 1." That the date of the protest referred to on page 36 is February 26, 1857; that subsequent entries on the protest books to these entries on page 36 testified to by him are continued, reference being made, after stating the importer, the vessel, the date of arrival, the amount of duty claimed. to some previous protest of the 89 by such entry as this: "Protest the same as No.—," and that the date of such
139 protest was given, and the name of the person who signed it. That is the way in which the book was kept, and that from his examination of the protest books he understood the mode of conducting the same in the years 1857, 1858, and 1859.

The witness on cross-examination by plaintiffs' counsel, on having his attention called to page 307 of the protest book No. 6, and being asked to give the dates of the entries of protest, testified, calling them off one after another, that the dates were July 6, 1857; July 1st, July 1st, July 6, July 6, July 1, June 17, June 6, May 9, May 19, May 26, June 30, June 26; that the dates on page 413 of that book read July 1, 1857; July 18, July 22, July 1, July 27, July 15, July 1, July 28; that on page 414 the dates were July 25, 1857; July 25, July 24, July 24, July 27, March 15; and on page 415, July 10, 1857; July 27, July 23, July 22, July 27, July 27, July 30, July 29; on page 419, July 31, 1857; July 30, July 30, July 30, July 1, July 30; on page 421, July 30, 1857; July 31, July 30, July 31, July 31, July 7, August 4; on page 430, September 16, September 17, September 19, September 22, September 24, September 24, September 29, September 28, September 9; on page 431, July 2, July 11.

By a JUROR. (Q.) Is that all that it says on those pages, just those dates which you have given?

WITNESS. No; it also gives the importers' name, the vessel, the date and the protest.

By a JUROR. Is there any protest entered in the name of these plaintiffs that you have spoken of?

WITNESS. Yes.

140 By the COURT. (Q.) As to these items where you have given the dates, the dates you have given are those that are written after what?

A. It gives here the importer, the vessel, and the date.

Q. The date is not written on the margin, but in a separate column by itself?

A. The date is written under the importation.

Q. Is there anything on the face of it to show what the date refers to, as to whether it is the date that the importer entered his protests or the date on which the clerk received it, or the date that he wrote it in the book; in other words, is there anything on the face of the book to show what that date means?

A. I take it as I read it, that that was the date of the importation.

(Witness in answer to a question propounded by a juror stated that on the pages from which he had read off the dates the whole protest was not copied by itself, but where it is similar to another protest previously written out and numbered it refers back to that other protest, and that this was done to save time in writing out a protest that was similar to a protest which had been written out.)

The COURT. I fail to see, in that book, the date of recording. I see what purports to be the date of the importation and what purports to be the date of the protest.

To defendants' counsel the witness testified on redirect examination, looking at page 307 of protest book, that the first date was July 6, 1857, and opposite to that and on the same page and under the reference

141 to the protests was the date July 6, 1857. The next date was July 1st, and the protest appeared to be dated July 1st. The next date was July 1st and the date of the protest was the same. The next to that July 6, and the date of the protest July 6. The next was filed July 1st dated July 1st. The next was filed June 17 and was dated July 1st. The next was filed June 16 and dated July 1st. The next was filed May 9 and dated July 1st.

The witness, in answer to a question propounded by the court, testifies that he took the date of importation to be the date given in the first column. That in reading from the book he had given that date first, and then he had read the date opposite as the date of the protest. That in answer to the questions of plaintiffs' counsel he had given both these dates. That he understood that the dates in the first column were the dates when the merchandise referred to therein arrived, and those were the dates he had given in response to the questions of plaintiffs' counsel. That the dates he had now been giving were the dates which purport to have been written on the face of the protest; and that those dates, which were later than these dates, were the dates of the protests which were made after the

importation, as he took it. That if a protest dated July 1st referring to an importation or entry of June 16 was handed to him, the first date to be written on the protest book would be June 16th, and July 1st would be written in the next column.

The witness, on being asked by the plaintiffs' counsel to turn to
142 page 413 of the protest-book and tell the dates of the importations and the date of protest, testified that the first entry showed as follows: The date of the importation was July 1st, 1857, the date of the protest July 1st, 1857; the next importation was made July 18, and the protest was of the same date; the third importation was made July 22 and the protest was dated July 22; the fourth importation was made July 1, 1857, and the date of the protest was the same; the fifth importation was made July 27, and the protest was of the same date; the next importation was made July 15, and the protest bore the same date; the next importation was made July 1st and the protest was of the same date; the next importation was made July 28, 1857, and the protest was of the same date. That on page 414 the date of the first importation was July 25 and the date of the protest was the same; the next importation was made July 25 and the protest was of the same date; the next importation was made July, 1857, and the protest was July, 1857; the date of the next importation was July 24 and the date of the protest the same; the date of the next importation was July 21st, and the date of the protest the same; the date of the next importation was July 24th, and that of the protest the same; the date of the next importation was July 27, and the date of the protest the same; that of the next importation March 15 and that of the protest the same.

The witness, in answer to a question propounded by plaintiff's counsel, testified that the latest date in protest book No. 6 was January 18, 1858; that on looking at the book he saw only three protests made in
143 1858, the last three in the book.

The witness, on being shown, by the plaintiffs' counsel, volume 7 of protest books, stated that the first date there was July 21, 1857, that the last date there was January 24, 1858, and that it really covered the same period as protest book No. 6.

The witness, Van Arsdale, on being called the next day for the defendants as a witness in their behalf, and on being asked if he wished to explain or modify his testimony as to protest books, as given by him on the day previous, testified that he had examined the protest book No. 6, that he had referred to on the stand, and that he had then testified that the date in the left hand margin of the first column was the date of importation, but that when he came to read the date of the protest opposite it he found that it was different; that the date in the margin on the left, or the first column, he thought, must be the date of filing of the protest, or date it was received at the customhouse.

By the COURT. (Q.) Do you know anything about it?

A. No.

Peter B. Kelly, being recalled as a witness by the defendants in their behalf, testified that he had made an examination of volumes 6, 7, 8, 9, 10, 11, and 12 of the protest bookt, and that in making such examination he had taken the books and gone over each entry; that he had exam-

ined every item and every page thereof from May, 1857, until two
144 months after the date of the last protest in this suit; and that, in addition, he had also made an examination of the indexes of these various books. That he had examined each book first, item by item, and having got the result of that examination, checked it by the indexes, not referring to the indexes first, as a check on his work. That he took the notation and checked the findings on the previous search, and that that was the process of his examination. That he was unable to find a record in said protests book of a protest attached to Exhibit 1; that he was unable to find a record of protest written on Exhibit 2, or of the protest of Exhibit 3, or of the protest of Exhibit 4; that he found a record of the protest of Exhibit 5, dated January 30, 1858, and recorded on that day.

The witness, on having his attention called to the protest of Exhibit 6, stated that he had found at page 136 of volume 8 of protest books, the following record: "Lachaise, Fauché & Co., Admiral, Havre, February 10, 1858, $4,333.55. Form of protest same as No. 58 and 30; date, Feb. 10, 1858; signed Lachaise, Fauché & Co." That protest No. 58 purported to be made by F. Cottenet & Atherton, str. Argo, Havre, January 8, 1858, $628.48. It is headed "58," and reads as follows:

"NEW YORK, *January* 28, 1858.

"AUGUSTUS SCHELL, Esq.,
"*Collector of Customs:*

"SIR: We object to the classification of our mousseline delaines
145 or worsted mousseline, embraced in our entry per str. Argo, from Havre, marked A. M., Nos. 555 and 556, under Schedule C, thereby submitting them to a duty of 24% ad valorem, while we claim that they are liable to 19% only, and for the following reasons, viz, because the article of worsted mousseline, or mousseline delaines, being a manufacture composed wholly of worsted, is subject only to the duty imposed on worsted fabrics, viz, 19%; that it has no connection with the articles denominated and known among merchants and dealers in the article as "delaines," which is specified under Schedule C, which is composed of a cotton warp and a worsted web. That the article mousseline delaine or worsted mousseline was known among merchants and dealers in the article at and long before the passage of the tariff act of March 3, 1857, by that name, as a manufacture of worsted, and as an article totally and entirely distinct from the fabric manufactured of worsted and cotton, known among merchants and dealers in that article exclusively by the title and name of delaines. That the article known as mousseline delaines is not manufactured in this country, while the article known as "delaine" is extensively produced here, and it could not have been the intention of Congress to impose a cotton duty upon an article manufactured wholly of worsted, and which did not come into competition with an American product. For these reasons we contend that we are entitled to enter and pay duty on the above described goods at the rate of duty imposed on manufactures of worsted, and protest against the payment of a higher rate of duty.

"Yours, etc.,

"F. COTTENET & ATHERTON."

146 That form 30 in the left hand margin of the first column reads: "Renauld, Francois & Co., Anawan, Havre, Dec. 4,'57, $2,197.20." The protest there recorded is headed '30,' and reads:

"AUGUSTUS SCHELL, Esq.,
"Collector of Customs:

"SIR: We protest against paying duty on 2½% or 3% commissions as charged on the merchandise embraced in the annexed entry, believing by law said goods are liable only to a duty on 2% commission, that being the usual rate of commission in the principal markets of the country from which said merchandise is imported. We claim that we ought not to be prejudiced by the fact that 2½% or 3% is charged in the invoice, because that rate has been added by the consignor to conform to the requirements of the customhouse, and not because such commission was paid or was the usual rate in the market whence the merchandise is imported. We also protest against being compelled to pay duty on commissions computed on the charges or expenses on the merchandise embraced in the annexed entry, believing commission is chargeable only at the cost or market value of said merchandise without the charges. We also protest against paying fees for oaths to entries, stamps on invoices, and orders from one department of the customhouse to another, believing there is no provision of law requiring us to pay the same, and we pay the amount exacted on this entry in order to get possession of the goods. You are hereby notified that we desire and intend this protest to apply to all future similar importations made by us.

"Yours, etc.,

"RANAULD, FRANCOIS & CO."

147 Mr. GREENWOOD. I will ask the stenographer to read the answer of the witness and see if he said "form protest" or "forms protest."

The stenographer reads from the witness's answer as follows: "Lachaise, Fauché & Co., Admiral, Havre, February 10th, 1858, $4,333.55, form protest same as No. 58 and 30."

The COURT. Have you read all the entry that is on page 136?

The WITNESS. Yes, sir.

Mr. GRISWOLD. I wish to call his attention to the question—is the entry "form of protest" or "forms of protest"? Is it singular or plural?

The WITNESS. I should say it was singular, sir.

By the COURT (Q.). How does it read?

A. "Form protest same as"——

Q. "Form protest," is that it?

A. Yes, sir.

Counsel for the defendant shows the witness the entry Exhibit 6 and he is asked when the duties appear to have been paid, and he testified that he knew the customary signature of the cashier and that there was written on the face of the entry "P. February 11, J. H."

That in case of the entry of Exhibit 7 he found no protest attached thereto or separate and detached therefrom. That on page 275 of volume 7 there was recorded a protest as to the Logan on commissions and charges, and

oaths on entries, dated October, 9, 1857, but that he found no record
148 of any mousseline delaine protest against the duty paid on Exhibit 7 in any of the protest books Exhibit 6 to 12; that he found no protest attached to the entry of the Persia Exhibit 8, and no protest separate or detached therefrom, and that he found no record in the protest books of any protest as to that entry; that there was a protest attached to the entry of Exhibit 9, which was dated June 30, 1858; that at page 17 of volume 9 of protest books he found recorded a protest dated June 30, 1858, against mousseline delaines made by Lachaise, Fauche & Co. in the case of Exhibit 9, and that the recorded protest is the copy of the protest attached to Exhibit 9; that he found attached to the entry of Exhibit 10 a protest on commissions, and also a separate mousseline delaine protest; that the mousseline delaine protest was specific in form; that he was unable to find recorded in any of the protest books either of these protests; that he found attached to the entry of Exhibit 11 a mousseline delaine protest dated July 9, and unsigned, to which was pasted a prospective charge and commissions protest, signed by the plaintiffs' firm and making a protest like that on Exhibit 6; that he was unable to find a record of this protest, or any part thereof, in the protest books; that he found no protest in the case of Exhibit 12, and no record of one in any of the protest books; that he found attached to the entry of Exhibit 13 a protest consisting of a mousseline delaine protest, unsigned, to which was pasted a prospective commissions protest, signed by plaintiffs' firm, being like protests on Exhibits 6 and 11, but
149 that he found no record of such protest, or either part thereof, in any of the protest books; that he found a protest attached to the entry of Exhibit 14 of mousseline delaines, and another separate protest on commissions, but that he found neither of these protests recorded in any of the protest books; that he found no protest in case of the entry of Exhibit 15 and no record of any in the protest books; that he found attached to the entry of Exhibit 16 a mousseline delaine protest and a separate commissions protest, but that he found no record of such protest in the protest books; that he found a mousseline delaine protest attached to the entry on Exhibit 17, but that he found no record of the same in the protest books; that he found a mousseline delaine protest attached to the entry of Exhibit 18, but no record thereof in the protest books; that he found no protest in the case of the entry of Exhibit 19 and no record of one in the protest books, and that the statement made by him as to Exhibit 19 was true as to Exhibit 20; that he found a mouseline delaine protest attached to the entry of Exhibit 21, but no record thereof in the protest books; that he found no protest in the case of the entry of Exhibit 22 and no record of one in the protest books; that he found attached to the entry of Exhibit 23 a mousseline delaine protest, but no record thereof in the protest books; that he found attached to the entry of Exhibit 24 a mousseline delaine protest, but no record thereof in the protest books; that he found a mousseline delaine protest attached to the entry
150 of Exhibit 25, but no records thereof in the protest books; that he found a mousseline delaine protest attached to the entry of Exhibit 26, but no record thereof in the protest books. That he found no protest in the case of the entry of Exhibit 27, and no record of one, and that that statement was true as regards the entry of Exhibit 28.

That he found a protest attached to the entry of Exhibit 29 on mousseline delaines, but no record thereof in the protest books; that he found a mousseline delaine protest attached to the entry of Exhibit 30, but no record thereof in the protest books; that he found a mousseline delaine protest attached to the entry of Exhibit 31, but no record thereof in the protest books; that in the case of the entry of Exhibit 32 he found a mousseline delaine protest, and that he found a record of that protest at page 298 of volume 10 of protest books, dated February 16, 1859; that in the case of Exhibit 33, he found a separate and detached mousseline delaine protest, and that the same was recorded at page 303 volume 10 of protest books; that in the case of the entry of Exhibit 34 he found a separate and detached mousseline delaine protest, and that the same was recorded at page 312 of volume 10 of protest books; that the name of the vessel by which the protested importations was made does not appear in the protest or in the record of the protest, but that the protest and record gives the marks and numbers of the cases mentioned in the entry of Exhibit 34; that in the case of the entry of Exhibit 34½ he found a separate and detached mousseline delaine protest, and a record thereof made March

151 7, 1859, on page 334, volume 10, of protest books; that in the case of the entry of Exhibit 35 he found a detached and separate mousseline delaine protest, and a record thereof at the same page of that protest book; that, in the case of the entry of Exhibit 36, he found a mousseline delaine protest, attached thereto, but no record thereof in the protest books; that in the case of the entry of Exhibit 37 he found a mousseline delaine protest attached thereto, and a record thereof on page 409 of volume 10 of protest books; that in the case of the entry of Exhibit 38 he found a mousseline delaine protest and a record thereof at page 434 of volume 10 of protest books; that in the case of the entry of Exhibit 39 he found no protest and no record thereof in the protest books, and that that statement was true as to Exhibit 40; that in the case of the entry of Exhibit 41 he found a mousseline delaine protest attached thereto, but no record thereof in the protest books; that in the case of the entry of Exhibit 42 he found no protest and no record of one in the protest books, and that this statement was true as to the entries of Exhibit 42, 43, 44, 45, 46, and 47; that in the case of the entry of Exhibit 48 he found a mousseline delaine protest attached thereto, but no record thereof; that in the case of the entry of Exhibit 49 he found a mousseline delaine protest attached thereto, but no record thereof; that in the case of Exhibit 50 he found a mousseline delaine protest attached thereto, but no record thereof; that in the case of Exhibit 51 he found attached thereto a mousseline delaine protest, but no record thereof.

152 That in the case of Exhibit 52 he found no protest and no record of one. That in the case of Exhibit 53 he found no protest and no record of one; and that the same statement was true as to the entry of Exhibit 54. That in the case of the entry of Exhibit 55 he found a mousseline delaine protest attached thereto, but no record thereof. That he also found a detached duplicate of the protest attached to the entry, which was recorded at page 34 of protest book No. 12; that the date of the endorsement of the detached protest was October 1, 1859, and the date of its record in the protest book the same, while the payment of duties protested against was made September 27, 1859; that in the

case of the entry of Exhibit 57 he found a mousseline delaine protest attached thereto, and a record thereof at page 37 of volume 12 of the protest books.

The witness on being shown a specific mousseline delaine protest detached and separate from any paper, testified that the same was a duplicate of the protest attached to the entry of Exhibit 57, and was numbered 6958, dated and endorsed October 17, and recorded at page 37 of volume 12 of protest books October 18, 1859. That there was nothing on the protest or on any of them that says it was filed. That in the case of the entry of Exhibit 58, there was a specific mousseline delaine protest, dated October 26, and on being shown a detached and separate protest, witness
153 testified that it was endorsed "7073: Lachaise, Fauché & Co. Ocean Queen; Oct. 27, '59, M de L.," and that the same was recorded October 28, 1859, at page 40 of volume 12 of protest books; that in the case of the entry of Exhibit 58 A, he found no protest and no record thereof. That in the case of Exhibit 59 he found a specific mousseline delaine protest attached thereto dated December 9, 1859, and on being shown a detached and separate specific mousseline delaine protest, the witness testified that it was a duplicate of the protest attached to that entry, and was endorsed "7478: Lachaise, Fauché & Co., Persia, Dec. 10, '59, M de L," and was recorded at page 50, volume 12 of protest books, December 12, 1859. That in case of the entry of Exhibit 60 he found a specific mousseline delaine protest attached thereto dated December 17, 1859, and on being shown a detached and separate protest, stated that the same was a copy of the protest attached to the entry endorsed "7606: Lachaise, Fauché & Co., Bremen, Dec. 19, '59," and was recorded December 20th, 1859, at page 53, volume 12 of protest books. That in case of the entry of Exhibit 61, he found no protest and no record of a protest; and that that statement was true as to the entry of Exhibit 62.

The witness Kelly, on cross-examination, on having his attention called to page 15 and 16 of volume 12 of protest books, testified that there was interleaved between these two pages pages 15-A and 16-A, and that the protests on such pages were marked 5948-A, 5950-A, 5951-A, and other
154 consecutive numbers with A after it. That the numbers on these pages, with the exception of the A after them, corresponds with some of the numbers of protests on pages 15, 14, and 13 of said protest book. That the date of record of the last protest on page 13 is August 6th, 1859. That the date of record of the first seven protests on page 15 is August 6th; that the date of the record of the next twenty-one protests is August 11. That there is no record of protests of August 9th and 10th between the dates of record of protests of August 6th and August 11th on page 15. That the record of protests of August 9th and 10th are found on the pages interleaved, namely, pages 15-A and 16-A. That on page 253 of the same protest book he found a paster, containing a record of eight protests, numbered from 16011-A to 16018-A, and that said paster was over the record of protests numbered from 16011 to 16018.

The defendants' counsel then produced as a witness in their behalf Charles M. Kaiser, who, being duly sworn, testified that he was employed at the customhouse in this city on March 26, 1877, and was engaged there as a porter downstairs for eighteen or twenty months; that thereafter he

was transferred to the record room of the customhouse as a porter and was there several months, and was then promoted to messenger. That the record room consisted of rooms in which entries, invoices, protests, and protest books were kept; that during the time he was employed in that department his duties were to get up entries and invoices; that he had had occasion during his employment to look into the books of the record room when he had occasion to go to the outward manifest and the inward manifest and the protest books. The witness, on being shown
155 protest books from volume 6 to 12, inclusive, testified that he had seen those books before, and that he went to those books when he had occasion to get up protests and to get the number of the protest from those books and to find the date of their recording; that he did not understand what the general understanding and tradition in the customhouse was as to the meaning of those books; that he was familiar with them only so far as their dates were concerned, and as they enabled him to get the numbers of the protest, and to go to the protest files and get the protest therefrom.

The witness, on being shown the left-hand column of page 333 of protest book No. 10, was asked if he knew what it meant, and testified that he could not say that he did.

The defendants then produced as a witness in their behalf I. Augustus Stanwood, heretofore produced as a witness by the plaintiffs, who testified that he was a refund clerk at the customhouse; that the duties of the refund clerk were to prepare certified statements for refund of excess of duties in suits; that he had had experience in the preparation of statements of refund in suits which arose under the protest act of 1845 and during the years 1857 and 1858; that in making up statements of refund in such cases he made a list of the importation and computations of the amount of duties paid in excess under the decision of the court and of the Treasury Department, and would ascertain whether the regulations of the law had been complied with as to such duties, and many other things; whether the entries of such importations had been duly protested;
156 that in ascertaining whether such entries had been duly protested he had had occasion to go to the protest books of the customhouse quite a number of times.

The witness, on being shown page 51 of volume 10 of protest books, was asked:

Q. Direct your attention, if you please, to the first entry there.

PLAINTIFFS' COUNSEL. I would like to ask him if he knows what the entries in that first column means. If he knows?

WITNESS. I have always understood them to mean, and have always acted upon the understanding, that it meant the date of the filing of the protest.

PLAINTIFFS' COUNSEL. The date of the filing, or the date of the recording, or the date of the endorsing of the protest?

WITNESS. The date of the recording of the protest. It appears to be the date of the recording of the protest.

The witness, in answer to defendants' counsel, further testified, that that had always been his understanding, and that he had so acted upon that understanding. That the first entry on the left-hand column of page 51 of protest book No. 10 was R. L. & A. Stuart, Evening Star, October

2, 1858; and that in the right-hand column of the same page and opposite thereto wss " Form 7," dated Oct. 2, 1858, and signed (R. L. & A. Stuart). That he understood that the date in the right-hand column of dates was the date the protest was made; and that the date in the protest ought to correspond to the date given in such right-hand column.

157 The witness, on being shown the paster on page 253 of volume 12 of protest books, which had been shown to the witness Kelly, and on being asked if he was acquainted with the handwriting on that paster, testified that he was not; that he did not know whose handwriting it was; that he did not see anything to indicate that there was any column on either page, or in any part of the book, as far as he new, that showed any date of filing, other than the date of the recording given therein; that he had never seen any other protest books than protest books Nos. 6 to 12, and that he knew them by the numbers; that he had never seen anything in any of them to indicate the date of filing other than the date in the left-hand column; that he did not know whether that date in the left-hand column was the date of recording or the date of the filing of protests; that might be and it might not be the same; that he did not know about it.

The witness Stanwood, on cross-examination, testified that he never compared the dates of the protest, that were filed that had an endorsement on them with the dates in the margin of the book for the purpose of seeing whether they corresponded; that he had compared them incidentally in getting the papers.

The witness, on having his attention called to the record of protests on page 12, volume 12, protest book No. 5872, testified that it purported to be a protest of J. W. Schulten & Hurd, No. 5872, and was recorded August 1, 1859.

158 The witness, on being shown a detached and separate protest, testified that it was endorsed " 5872, J. W. Schulten & Hurd, Jura, July 30, 1859;" that the date of the protest and the date of the record did not correspond; that the name signed to the protest, as appeared by the inside thereof, was Joseph Fisher, jr., or Joseph Fisher & Co., he could not tell which.

The witness, in answer to defendants' counsel, testified that he did now know that Joseph Fisher, jr., was agent of J. W. Schulten & Hurd, and that he did not know he was not; that he did not know anything about him.

The witness, in answer to the plaintiffs' counsel, testified that he found recorded in protest book 12, seventy protests by Joseph Fisher.

The witness, on being asked by defendants' counsel where he got the dates of protest in making up statements of refund, testified that he went to the protest books and found from them where to look for the protests, and then got the protests from the files; and on being asked if he governed himself by the protest books, or by what, as to the dates of filing of protests, answered that he acted upon the understanding that the left-hand column of the protest book gave the date of filing, and then looked in the place of the files indicated by the protest book.

The defendants' counsel then produced as a witness in their behalf Frederick W. Brooks, who, being duly sworn, testified that he was a clerk in the liquidating bureau of the New York customhouse. That the liquidating bureau was a bureau in the customhouse where the duties upon

the imported merchandise were accurately ascertained. That in
159 that bureau the invoices of imported merchandise are examined after the goods have been appraised, and after the public store packages have been examined by the appraiser, and the return made with the statement of what the appraiser has found made out upon the invoices. That the invoices are then compared with the entry, and any additional duty found to be due beyond that paid by the importer at the time of making his entry is then computed, and if the importer is found to have paid more duty than is due, what is called a refund is then made to him. That is the liquidation of an entry.

The witness testified that he was thoroughly familiar with customhouse business, and that he had been employed about the duties he had described at the customhouse for about nine years. That he had been employed in the customhouse in all about nineteen years. That prior to the nine years of which he spoke, he was confidential clerk in the law division of the customhouse, and as such clerk he had entire charge of all violations of the revenue laws. That he prepared cases for trial which were to be tried in court, and that he had charge of the correspondence in that branch of the business, and did anything else that was brought to his particular attention. That he was employed in that bureau nine years, from 1869 to 1878, and that prior to his employment in the law division he was employed in the auditor's division of the customhouse, as a ship liquidator for about a year. That a ship liquidator was one who took the officers' re-
160 turns of merchandise imported by different vessels which are filed in the customhouse by the inspector of merchandise, and compares those returns with the entries that have been made by the importer of the merchandise imported in such vessels; and a ship liquidator is required to see that there are entries made by the importer for all the merchandise which has been imported in such vessels. That he had examined the entries in suit, and the customhouse books relating thereto to determine the date of the delivery of goods mentioned in such entries and the payment of duties thereon.

The plaintiffs' counsel thereupon admitted that all the cases mentioned in the amended entry of Exhibit No. 1 were delivered upon the payment of 19 per cent. duty, with the exception of case G B C, 2072, which was sent to the public stores and delivered to the plaintiffs' firm on the 25th of July, 1857.

The witness, Brooks, then testified that an additional 5 per cent. duty was paid on all cases mentioned in said amended entry on July 25th, 1857. That he had no means of ascertaining what the amount of duty, at 5 per cent., was on the cases mentioned in said amended entry, with the exception of 2072.

The witness, on having his attention directed to the entry of Exhibit 44, and the amended entry of Exhibit 44a, testified that case J H 709, therein mentioned, was partially entered at 19 per cent. and partially at 24 per cent. duty. That cases 711 and 712 were entered at 19 per cent.
161 That cases Nos. 713 and 714 were entered at 24 per cent.; 715 and 716 were entered partially at 19 per cent., partially at 24 per cent. That cases Nos. 709 to 712, and 715 and 716 were delivered to the importer on the 30th day of June, 1859, and that thereafter, and on the 19th day of July 1859, an additional duty of 5 per cent. was exacted on

such of these cases, or on so much thereof, as had been previously, and on June 23rd, 1859, subjected to a duty of 19 per cent. only; that the additional duty of 5 per cent. on these cases and the parts thereof, amounted to $216.55.

Almon W. Griswold, being called as a witness on behalf of the defendants, and being duly sworn, testified that he was the attorney for the plaintiffs in this action; that this action was a consolidated action, and consisted of six or seven original and distinct actions, and that said several and distinct actions were commenced between August, 1857, and about June, 1861, under the supposition that the fifth section of the act of March 3rd, 1857, required suit to be brought within thirty days after protest was made and appeal taken to the Secretary of the Treasury. That the original plaintiffs were Armand Lachaise, Victor Fauché, Marius A. Sorchan, and J. L. Allien; that Mr. Lachaise and Mr. Allien were dead; that Mr. Allien had a son living in this country, who was in the court since the trial of this action was commenced; that Mr. Sorchan resides in Paris,
France, and was in this city last autumn, expecting this case to
162 be tried, and was here all the winter; that Mr. Fauché was living in France, as far as witness knew.

That all the money that might be recovered in this suit would go to Mr. Fauché and Mr. Sorchan, as surviving partners of the plaintiffs' firm or their representative, that there had been no refund of duties exacted on mousseline delaines embraced in this suit, so far as he knew.

The witness on having his attention called to page 253, volume 12, of the protest books, and having his attention directed to the handwriting on the paster, on that page, stated he knew whose handwriting it was; that it was the handwriting of one Hallock, a refund clerk at the customhouse, who also kept the protest books. That he was not then living; that he died on board a steamer going to Savannah, about 1862, of consumption. That he was employed at the customhouse to keep the protest books, and perform the duties of refund clerk.

Plaintiffs then recalled I. Augustus Stanwood, as a witness in their behalf, who further testified that he had made a re-examination and a revised calculation of the items of duty at 5 per cent. set out on his schedules and that he had placed the items in red ink at the end of the schedules. That the figures thereon were correct, and that he found the total amount of principal of duty at 5 per cent. paid on those items was $18,521.70; that the interest thereon to December 31st, 1879, at 7 per cent., was $27,320.25; that the interest thereon from that date to October 26, 1887,
was $8,689.61, making a total of principal and interest of $54,531.56.
163 That this principal and interest is less than the principal and interest testified to by him before by the amount of principal and interest disclaimed by the plaintiffs in the case of Exhibits 43a, 45, and 52.

Plaintiffs then recalled as a witness in their behalf John V. Van Arsdale, who testified that he had been employed in the customhouse in this city for twenty-three years. That he remembered that a box was kept somewhere in the customhouse in this city twelve or fifteen years ago, upon which was written, printed, or painted, "protest box;" and it may have been longer ago than that.

Witness on being further questioned about the time when the protest box was there, said he thought he could say about thirteen years. That that was as far as he cared to state.

The witness, in answer to questions of the court, stated that he had been in the customhouse twenty-three years; that he could not say whether the box was there when he went there, or whether it came afterwards; that he did not remember whether it was there before he came or not.

Plaintiffs then called as a witness in their behalf Stephen G. Clarke, who, being duly sworn, testified that he was a deputy collector of customs at the customhouse in this city from March, 1869, to June, 1872, and in charge of the ninth division, as it was then called—the law division.

The witness, on being asked if he had any recollection of how protests which were filed separate from the entries were deposited at the customhouse during those years, answered that there was a box attached
164 to the door entering the 9th divisoon—one of the doors—the principal door or entrance, like a letter box, with a slit cut through the door, and an notice that all protests were to be deposited there. That that was kept locked and was opened the first thing in the morning each day, and the protests in it were stamped and recorded as having been filed the preceding day. That witness found that to be the rule when he entered the customhouse, and it continued while he was there.

The witness, on cross-examination, testified that he was not now a deputy collector but an attorney and counsellor at law, and was an attorney for plaintiffs in quite a number of suits against the collector. That his knowledge of this protest box did not extend back prior to the time of his entering the customhouse, which was sometime in March, 1869. That he did not know when that box was established; that it was there when he went there.

Frederick W. Brooks, being recalled as a witness in behalf of defendants, testified that since he was on the witness stand he had examined Exhibits Nos. 1 and 2; that the payment of duties in case of Exhibit No. 1 was made July 25th, 1857. That he had the inspector's return of the value of the goods mentioned in the entry of that exhibit. That of the cases mentioned on the amended entry of Exhibit No. 1, cases 2073 to 2075, were delivered from the ship to the importer on July 13th and 17th, 1857. That cases 2069 to 2072, as appears by the warehouse ledger of the general order stores at 290 South street, were sent to general
165 order stores, and were delivered to the plaintiffs' firm on the 18th of July, 1857.

The witness on having his attention called to the entry of Exhibit 44 and the entry of Exhibit 44a, stated that the officer's return of the vessel by which the goods mentioned thereon were imported, showed that these goods, cases 709, 711, 712, 715 and 716, were delivered to the importers on July 1st and 2nd, 1859, and that the additional duty of 5 per cent was paid on these goods thereafter, and on July 19th, 1859; that of these cases 710 was sent to the public stores, and was delivered to the plaintiffs' firm after the payment of the additional 5 per cent. duty; that the amount of the 5 per cent. duty that was paid on cases 709,711, 712, 715 and 716 was $129.80. The interest thereon at 7 per cent. to December 31st, 1879, was $186.40, and that interest thereon from the last mentioned date until October 6th, 1887, at 6 per cent. was $61, making a total of principal and interest of $377.20.

The witness on being shown the entry of Exhibit 52 testified that the officer's return of the vessel by which the merchandise mentioned thereon

was imported showed that cases 761 and 762 were delivered on the 2nd and 3rd of September, 1859, to the plaintiffs' firm on a payment of duty at the rate of 19 per cent. ad valorem; that on the 21st of September an additional duty was paid on these cases amounting to the sum of $31., or $14.40 in addition to the sum of $16.56, which was heretofore disclaimed by the plaintiffs.

166 The witness, on having his attention called to the entry of Exhibit 54, stated that the officer's return of the vessel by which the cases thereon mentioned were imported, showed that case 766 thereof was delivered from the vessel to the plaintiffs' firm on the 16th day of September, 1859, on the payment of 19 per cent. duty. That on the 1st day of October, 1859, an additional duty of 5 per cent. was paid on this case. That the additional 5 per cent. duty paid on case 766 was $39.75; the interest thereon to the 31st day of December, 1879, at 7 per cent., was $56.35, and the interest thereon from December 31st, 1879, at 6 per cent. to October 26, 1887, was $18.70.

The witness Brooks, on cross-examination, testified that he had been nine years in the liquidating department of the customhouse, and on being asked to explain how that the additional 5 per cent. duty paid on the cases of the entry of Exhibit No. 52 was more than $16.56, testified that the amended entry thereof showed that goods to the value of $622 had paid an additional 5 per cent. duty; that is, a duty of $31.10. That that amount of $31.10 is not carried out, but the value and the date and the rate of duty appears distinctly on the entry. That the computation of the amount was his own. That the return of the appraisers on the invoice showed that a portion of case 762 was entered at 19 per cent. and returned by the appraiser as delaines, Schedule C, making it dutiable, at that time,

167 at 24 per cent.; that that was the portion that was affected by the change; that it was customary, in former years, to note on the invoice the amount of the additional duty and the date of payment thereof. That the amount so noted corresponded with the amount of additional duty found on the amended entry. That on the invoice of Exhibit 52 he found the amount of the additional duty on these very cases of goods.

Q. What is the amount?

A. That is to say, I shall have to qualify that answer—I found no reference on the invoice that the addition applies to the particular cases, so that I can not answer your question exactly as I ought to have done.

Q. Is there any other addition on that invoice?

A. There is none.

Q. Is there on the entry?

A. There is none.

Q. The amount is not carried out on the entry?

A. It is not.

The witness further testified that it was customary in liquidating an entry where there had been an overpayment of duty on certain cases, and a short payment on other cases, to equalize those payments on the amended entry; that he could not say in whose handwriting the memorandum made on the Exhibit 52 was; that it was made before he became connected with the customs service; that in the ordinary course of business the amendment

clerk or the liquidating clerk would have made that memorandum; that he thought that at the time such memoranda were made, they were made by amendment clerks; that there are no clerks now known by that
168 name; that the entry of Exhibit 52 was finally liquidated on the 21st day of September, 1859; that the date of the memorandum on the entry referred to was dated the 21st day of September, 1859, and that the date of the amendment was the 21st day of September, 1859; that on the day the entry was liquidated the memorandum was made.

These two cases, 761 and 762 of Exhibit 52, was to have an increase in duty of from 19 per cent. to 24 per cent. That there was a record of the payment of the additional duty, endorsed on the invoice, belonging to the entry, which evidently referred to those cases. That there was no other evidence of payment on the invoice, but the one above referred to by him. That the date of the payment of the additional duty was November 28, 1859.

The witness on being asked if there was anything on the face of these papers of Exhibit 52 to show what was paid, answered, "I have computed what the refund would have been on these goods, and my computation makes it agree substantially with this memorandum endorsed on the entry; that is to say, that the value on which the increased rate of duty from 19 to 24 per cent. should have been exacted was about $622, in accordance with my computation, made after the court adjourned.

The witness on redirect examination testified that he had stated that there was nothing on the invoice, or the entry, of Exhibit 52 to show that of that additional duty at 5 per cent., namely, $31.10; more than $16.56 was paid. That he had made an examination of the cashier's
169 books of duties paid to find out whether there was anything to indicate the payment of these additional duties, or any part thereof; and that he was not able to find any record in such book of the payment of any of the additional duty.

The witness, on recross-examination, testified that he had not reliquidated the entry of Exhibit 52 to see whether the computations were all right as to the other goods mentioned in the entry.

Both sides then rested.

Defendants' counsel then moved the court to direct the jury to find in favor of the defendants as to cases 2069, 2070, 2071, 2073, 2074, and 2075 of Exhibit 1, on the ground that these cases, having been delivered on the payment of 19 per cent. duty and the additional duty of 5 per cent. now sought to be recovered, having been paid after such delivery, the payment of such additional 5 per cent. was not made to get possession of the goods contained in these cases, as required by the protest act of February 26, 1845. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

The defendants' counsel then moved the court to direct the jury to find in favor of the defendants as to the parts of cases 709, 711, 715, and of 716 of Exhibits 44 and 44a which were delivered to the merchant on the payment of 19 per cent. duty, on the ground that the additional 5 per cent. duty exacted on the same and now sought to be recovered by
170 plaintiffs was paid after the delivery of such cases and parts thereof, and was not made to obtain possession of the goods as required by the aforesaid act of February 26, 1845. This motion the court denied,

and to this ruling the defendants' counsel excepted, which exception was duly noted and allowed.

The defendants' counsel moved the court to direct the jury to find in favor of the defendants as to cases 761 and 762 of Exhibit 52, on the ground, first, that the same were delivered on the payment of 19 per cent. duty, and the 5 per cent. additional duty now sought to be recovered having been paid after the delivery thereof was not paid, if at all, to get possession of the goods, as required by the said act of 1845; and, second, on the ground that there is no proof that the part of such additional duties not heretofore disclaimed, but now claimed to be recovered, was paid. This motion the court denied, and to this ruling the defendants' counsel excepted, which exception was duly noted and allowed.

The defendants' counsel then moved the court to direct the jury to find in favor of the defendant as to case 766 of Exhibit 54, on the ground that the same having been delivered on the payment of 19 per cent. duty, and the 5 per cent. additional duty exacted thereon, and now sought to be recovered, having been paid after such delivery, the payment of such additional duty was not made to obtain possession of the goods in such case as required by the aforesaid act of 1845. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

171 The defendants' counsel then moved the court to direct the jury to find in favor of the defendants as to Exhibit 1, 2, 3, and 4, on the ground, first, that the protests, upon which the plaintiffs rely to recover the additional duty of 5 per cent. exacted thereon, being against the exaction of 24 per cent. on worsted stuff goods, there is no proof in the case and no stipulation therein as to the character and material of any of the importations of said exhibits, or as to the rate of duty to which they, or any of them, should be subject under the law in force at the time they, or any of them, was made; second, that neither of said protests upon which plaintiffs rely to recover as to such exhibits distinctly and specifically set forth the ground, or grounds, of objection to the payment of the duties exacted on any of the importations mentioned therein, as required by the aforesaid act of February 26th, 1845. This motion the court denied, as to Exhibits 1 and 2, and granted as to Exhibits 3 and 4; to the ruling of the court in denying the defendants' motion as to Exhibits 1 and 2 defendants' counsel excepted, which exception was duly noted and allowed.

Thereupon the court directed the jury to find for the defendants as to Exhibits 3 and 4, and the jury, in accordance with such direction, found for the defendants as to Exhibits 3 and 4.

To this ruling and direction of the court counsel for the plaintiffs excepted, which exception was duly noted and allowed.

172 Defendants' counsel then moved the court to direct a verdict for the defendants as to each and every importation mentioned in the sixty-two exhibits, excepting those of Exhibits 3 and 4, on the ground, first, that there was no proof or stipulation in the case that the payment of duty sought to be recovered was made to get possession of any of said importations, or any part thereof, as required by the aforesaid act of 1845; second, that there was neither any proof nor any stipulation in the case that any protest against the payment of any part of the duties now sought to be recovered was ever served upon the collector, who exacted them as re-

quired by the aforesaid act; and third, that if any protest was so served there was neither any proof nor any stipulation in the case that the same was served at or before the payment of such duties, as required by the aforesaid act. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

Defendants' counsel then moved the court to direct the jury to find for the defendants as to the importations mentioned in Exhibit No. 6, on the ground that the mousseline delaine protest attached to the entry of said exhibit, upon which the plaintiffs relied to recover, was unsigned, and that the signature of the plaintiffs' firm to the charges and commission protest pasted on to such mousseline delaine protest was not a signature by the claimants, plaintiffs' firm, of such mousseline delaine protest as is required by the aforesaid act of February 26, 1845. This motion, the
173 court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

Defendants' counsel then moved the court to direct the jury to find for the defendants as to the importations mentioned in Exhibit 11, on precisely the same grounds as their motion was made for a direction of a verdict as to the importations mentioned in the entry of Exhibit 6. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

Defendants' counsel then moved the court to direct the jury to find for the defendants as to the importations mentioned in Exhibit 13, on precisely the same grounds as their motion was made as to the importations mentioned in the entry of Exhibit 6. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

Defendants' counsel then moved the court to direct the jury to find for the defendants as to the importations mentioned in the entries of Exhibits 7 and 8, on the ground, first, that no protest was made as to either of said importations as required by the aforesaid protest act; second, that notwithstanding the prospective clause of the signed charges and commissions protest pasted on to the unsigned mousseline delaine protest attached to the entry of Exhibit 6, such prospective clause is a part of the charges and commissions protest only, and in no way applies to, or is a part of, the unsigned mousseline delaine protests to which such charges and
174 commissions protest is pasted. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

Defendants' counsel then moved the court to direct the jury to find for the defendants as to the importations mentioned in the entry of Exhibit 12, on the ground, first, that no protest was made as to any of such importations as required by the act of 1845; second, that notwithstanding there is a prospective clause in each of the signed charges and commissions protests pasted on to each of the unsigned mousseline delaine protests attached to the entries of Exhibits 6 and 11, such prospective clause is a part of its respective charges and commissions protests only, and in no way applies to, or is any part of, the unsigned mousseline delaine protest to which its charges and commissions protest is pasted. This motion the court denied and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

Defendants' counsel then moved the court to direct the jury to find in their favor as to the importations mentioned in Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 43A, 44, 44A, 45, 46, 47, 48A, 52, 53, 54, 56, 58A, 61, and 62, on the ground, first, that no protest was made as to any of such importations as required by the act of February 26, 1845; and, second, that notwithstanding there is a prospective clause in each of the charges and commissions protests pasted on to each of the unsigned mousseline delaine protests attached to the plaintiffs' prior, in time, entries of
175 Exhibits 6, 11, and 13, such prospective clause is a part of its respective charges and commissions protest only, and in no way applies to, or is a part of, the unsigned mousseline delaine, protest to which its charges and commissions protest is pasted; and, third, that the effect of any of such prospective clause as to each of the aforesaid subsequent unprotested importations of plaintiffs' Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 43a, 44, 44a, 45, 46, 47, 48a, 52, 53, 54, 56, 58a, 61, and 62, was under the principle laid down in the decision of Baxter v. Maxwell, 4 Blatchford, 32, nullified by intervening specific mousseline delaine protests without prospective clause, as follows: As to Exhibits 19 and 20 by the specific protest of Exhibits 14, 16, 17, and 18, and the intervening unprotested importation of Exhibit 15; as to Exhibit No. 22 by the specific protest of Exhibits 14, 16, 17, 18, and 21, and the intervening unprotested importations of Exhibits 15, 19, and 20; as to Exhibit 27 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, and 26, and the intervening unprotested importations of Exhibits 15, 19, 20, and 22; as to Exhibit 28 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, and 26, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, and 27; as to Exhibit 39 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, and 28; as to Exhibit 40, by the specific protest of
176 Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, and 39; as to Exhibit 42, by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, and 40; as to Exhibit 43 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, and 42; as to Exhibit 44 by the specific protests of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, and 43; as to Exhibit 44a by the specific protests of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 43, and 44; as to Exhibit 45 by the intervening specific protests of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 29, 40, 42, 43, 44 and 44a; as to Exhibit 46, by the intervening specific protests of

Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32,
177 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, and 45; as to Exhibit 47, by the specific protests of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, 45, 46; as to Exhibit 52 by the specific protests of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, 41, 48, 49, 50, 51, and the intervening unprotested importations, Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, 45, 46, and 47; as to Exhibit 53, by the specific protests of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, 41, 48, 49, 50, and 51, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, 45, 46, 47, 48a, and 52; as to Exhibit 54 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, 41, 48, 49, 50, and 51, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, 45, 46, 47, 48a, 52, and 53; as to Exhibit 56 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, 41, 48, 49, 50, 51, and 55, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, 45, 46, 47, 48a, 52, 53, and 54; as to Exhibit 58a, by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29,
178 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, 41, 48, 49, 50, 51, 55, 57, and 58, and the intervening unprotested importations of Exhibit 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, 45, 46, 47, 48a, 52, 53, 54, and 56; as to each of Exhibits 61 and 62 by all of the already mentioned specific protests, together with those of 59 and 60, and all of the already mentioned unprotested importations.

This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

Defendants' counsel then moved the court to direct the jury to find for the defendant as to the importations mentioned in the entries of Exhibits 1, 2, 10, 11, 13, 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 36, 41, 49, 50, 51; on the ground, first, that each of the protests now written on, or attached to, or detached and separate therefrom and alleged to relate to said exhibits, and to have been found on the files of the customhouse are none of them recorded in the protest books in which protests are recorded and therefore appear never to have been served upon the collector or on any authorized agent of the collector; second, that there is neither proof nor stipulation in this case that any of said protests were ever served upon any collector, or any authorized agent of his. Third, that if so served there is no proof or stipulation in the case that any of said protests were so served on the collector, or his authorized agent, at or before the payment of the duty now sought to be recovered; and, fourth, that as
179 to none of said importations does the prospective clause of the pasted protest on each of the unsigned mousseline protests attached to Exhibits 6, 11, and 13, entitle the plaintiffs to recover, for the reasons already mentioned in defendants' motion for the verdict as to said Exhibits 6, 11, and 13; and fifth, that if otherwise the plaintiffs would be entitled to recover by virtue of the prospective clause of said pasted charges

and commissions protest of Exhibits 6, 11, and 13, the effect of such prospective clause, if any, was under the principle laid down in the decision of Baxter v. Maxwell, 4 Blatchford, 32, nullified as to all of the importations as to which this motion is made, except those of Exhibits 1 and 2, by the various intervening specific protests without prospective clauses, and by the various intervening unprotested entries.

This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

The defendants' counsel then moved the court to direct the jury to find in their favor as to the importations mentioned in Exhibits Nos. 14 and 41, on the ground that each of the protests upon which the plaintiffs relied to recover as to the same was undated, and there is neither proof nor stipulation in this case that any of said protests was ever served upon the collector, or if so served, was so served at or before the payment of the duties now complained of, as required by the act of February 26, 1845.

180 This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

The defendants' counsel then moved the court to direct the jury to find in their favor as to the importation of Exhibit No. 34, on the ground that there is no mention in the protest of that exhibit of the vessel in which the importation was made.

This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

The court then delivered the following opinion:

The question of prospective protests is common to many of these entries. If this were a question simply of a consideration of the decision in Brune v. Marriott (9 How., 619), and of the act of 1845, I should have very little difficulty in dealing with it. The decision in the Marriott case is very carefully guarded by the court. It is restricted to the facts before it. The court expressly says in the opinion that the amount is very small; that there was a common understanding between the collector and the importer that these protests were good generally, and that the money paid for duty had not been covered into the Treasury. I should not consider that decision as sufficiently authoritative to require the ingrafting upon the act of 1845 of the doctrine of prospective protests. I do not see that that

181 act contemplated any such method of protest. But it is undoubtedly the fact that by a gradual process of accretion, which has gone on for many years, each decision going further than the one before it, the weight of authority in this circuit is, undoubtedly, in favor of a liberal construction of these protests, and that, of course, is controlling upon us here. The only qualification in this circuit to which my attention has been called is the case of Baxter v. Maxwell (4 Blatchf., 32). In that case, as I understand it, subsequent to the service of the prospective protest, there were served, as to different importations, specific protests, stating other and different grounds from those named in the prospective protests and not reiterating the grounds therein stated. The court held that in such cases the importer was to be restricted to the specific ground which his protest alleged with regard to that importation, and that the fact that he had failed to reiterate the old ground, and stood, as to that importation, upon the new grounds, would be sufficient to warrant the collector in assuming that

from and after the service of this amended protest, as we might call it, that is, the new statement of his grounds, he intended to rely only upon the grounds then given. The facts in this case are not parallel with that cited, because, from the beginning of these protests to the end of them (certainly from protest No. 6, the first prospective protest, down to the close), the importers always served with each of these protests this same mousseline de laine protest. Sometimes it is accompanied with other
182 protests, and with the prospective clause, and sometimes it is not; but he never makes any protest at all without reiterating the mousseline de laine protest. He has not, therefore, as to that shifted his ground, as the importer did in the Baxter case, and therefore, in my judgment, is not within the rule there laid down. I feel constrained, therefore, by the decision in this circuit to rule that the prospective protests are good as covering subsequent importations.

There is here no general prospective protest. There are a number of specific protests with a general clause attached to them. In order to obtain any vitality at all they must, of course, have been properly served as specific protests; otherwise they would have no force at all, and would not operate as prospective protests. For instance, if the money was paid on January 2d, and on January 4th a protest was made as against that importation, that protest would not be good as to that importation, nor would I be inclined to extend the doctrine of prospective protests so as to hold its prospective clause good as to any other importation; but if a prospective protest, with a general clause at the end, is properly served, and is in proper form, and may be regarded as a specific protest, the clause would then become operative as a general protest, prospective in its effect, and covering future importations. With that understanding we may proceed to an examination of these various items.

It is true that the importer has to do three things; he has to
183 show that the rate of duty was excessive; that the duties were paid in order to obtain possession of the goods; and that a protest, in writing, signed by him, distinctly and specifically setting forth the grounds of his objection, was served at or before the payment of the duties. Concededly the duties are excessive; and that question is out of the case.

The next question is as to the payment in order to get possession of the goods. Now, the law in force at that time required that duties should be paid in cash; and also required that the duties should be paid before the goods were delivered. In the case therefore of all these entries where the original amount of duty paid was computed at the rate of 24 per cent., and where it appears that, as matter of fact, the duty was paid before the goods were delivered, it must be assumed that the duty was paid to obtain possession of the goods. The law requires that the duty should be paid first. The law forbade the delivery of the goods without payment of the duty. If the duty were in fact paid before the goods were delivered, it is a proper assumption that it was paid to obtain possession of the goods. With regard to those cases where there were amended entries, where, subsequent to the first payment, there has been an increase of duty, and the increased amount paid, it appears in each case, except in those which have been disclaimed, that the duty was in fact paid before the packages which were sent to the appraiser's stores for examination were delivered. The

condition there was this. The law required that duties should be
184 paid before the goods were delivered. The goods which had been delivered to the merchant prior to the examination and increase of duty, were delivered under the 10-day bond, which obligated the importer (as I understand its form, and I think one is in evidence; if not, the form appears from the regulations) to return the goods upon call, if that call was made within 10 days. In view of that fact I am clearly of the opinion that the duties which were paid before the delivery of the last packages of goods were paid to obtain possession of the goods within the meaning of the statute.

The only question then left is as to the protest; that is, as to its form, as to its service (meaning the method of service) and as to the time of service. As to the form of these printed protests, and notably of the first so-called prospective protest No. 6, where one protest is pasted to another with the signature at the foot of the composite document thus constructed, I am of the opinion that in view of the decisions as to the rules which should be applied in the construction of these protests, which are prepared by business men and in the hurry of business, that the protest is sufficient, that the prospective clause covers everything that is in it from the beginning to the end; and that, therefore, so far as mere form is concerned, the first prospective protest put in will cover all the subsequent importations. On the question of form, there only remain the first five of these protests. I think that Nos. 1, 2, and 5 are sufficient in form, in view of the decisions which have been cited on the argument, be-
185 cause they indicate to what particular part of the tariff act the importer appealed for a rectification of the amount of duties exacted from him. As to Nos. 3 and 4, I am not satisfied that they do, with any sufficient degree of clearness, or that they do at all, indicate upon what clause it was that the importer relied as securing him the 19 per cent. duty. It will not do for an importer to say "my goods are subject to the 19 per cent. clause," or the 10 per cent. clause, or are on the free list; but he must indicate in what part of the clause they are designated. He need not do so by an enumeration of the particular section, or by any technical wording; but he must do so, in his protest, in language so plain that there will be no difficulty in finding whereabouts it is that he supposes that the exemption, or the reduction of duty, is provided for. Therefore, as to Nos. 3 and 4, I shall direct a verdict for the defendant, on the ground of the insufficiency of the form of protest.

The next question is as to the service of protest, as to its method of service. The regulations and the statute are alike silent as to who shall be served; that being so, inasmuch as it is a protest against the action of the collector, we may assume that it should be served upon him, or upon such person as might properly take his place for the purpose of service. In the absence of anything controlling, either in the statute or in the regulations, it would be for the collector, within reasonable limit, to determine in what way the protest should be served. Of course it would not
186 be expected that the collector should himself receive all these notices, unless he choose to do so. He might delegate any one to receive them; they might be served upon the collector personally, or they might be served upon such deputy, clerk, or officer in the department as

he might have designated to receive them; they might be served by depositing them in such receptacle in the department as he might have designated as the place where they should be put. Where a particular method of serving protests against exactions of duties generally had been in force, and recognized by the department for a considerable time past, it is to be assumed that service made in that way is sufficient until some change, promulgated by authority of the collector, is announced. Now, while there is no official order made by the collector in evidence, still there is evidence here of a custom, method, or usage in which, for a considerable period of time anterior to the date of these transactions, and, as I understand it, anterior to the promulgation of the regulations of 1857, these protests were served; namely, by passing them in with the entry. In the absence of any proof of promulgation by the collector of an order making some alteration in that method of service, I shall hold that it is a sufficient method, so far as the manner of service is concerned. The regulations which have been put in evidence may, of course, control the collector, but they cannot control the importer as to the manner in which he shall prepare these notices. For instance, a provision that he shall not write a protest on the entry, or a provision that he shall write it on
187 a separate piece of paper, and not fasten it to the entry, or any regulation of that kind, might be binding upon the collector, and, perhaps, upon the other officers of the Government, so as to justify them in refusing to consider the protest, or to make a refund; but, whenever the importer goes into court, if he shows that he served the protest which the statute called for, a written protest signed by himself, setting forth distinctly and specifically the grounds of his objection, and served it on the collector, or on such person as might properly be considered the alter ego of the collector for the purpose of receiving the notice, he has complied with all the requirements which the law calls upon him to comply with.

With these views as to the form, and the manner and the time of the service, there is but little left in this case. The service of the first prospective protest, No. 6, is proved as fully and completely as I suppose it is ever possible, after the lapse of a generation to prove any particular transaction. The proof offered by the plaintiffs furnishes a strong presumptive case in favor of the service of the protest; and the proof from the records of the Department that such protest was recorded when received, and stands of record as of a certain date, is abundant to establish the fact that it was served on the collector, or on the proper party authorized to receive it, and that it was served in time. From and after the service of that protest, therefore, all questions as to the form of protest, or as to the manner of service, or as to the date of service, require no further considera-
188 tion. The doctrine of prospective protest, as laid down in this circuit, is sufficient to cover all the subsequent importations.

Number 5, the entry by the Morning Star, stands in precisely the same position. That protest is also recorded in the books of the customhouse. The fact of its recording, and that it is recorded there, and that the date of its recording there is sufficient in point of time, is sufficiently established to warrant the holding of the sufficiency of the protest in point of time.

Numbers 3 and 4 are disposed of in the other branch of the case, and there then remain only Nos. 1 and 2. As to these protests, I have more

doubt upon the question as to whether or not I should send it to the jury to determine whether they were served in time. But, in view of all the evidence in the case, in view of the fact that they come here in writing on the face of the entry, a method of protest which, under the statute, the importer was entitled to adopt if he chose to do so, and in view of proof of the fact that from the time that the entry goes to the cashier, at or about the time of the payment of duties, it passes out of the custody of the merchant and remains in the custody of the customhouse, except so far as he may from time to time be able to look at it in the presence of the customhouse officers, I have arrived at the conclusion, in the absence of any evidence except the presumptions or inferences to be drawn from these protest books, and from the fact that the instrument was not
189 recorded there, that there is sufficient proof here which is practically uncontradicted to warrant the court in taking it from the jury, and in drawing the inference that the protests in regard to the entries Nos. 1 and 2 were served in proper time.

I, therefore deny the several motions of the defendant except the one as to Nos. 3 and 4; directing a verdict for the defendant for Nos. 3 and 4, on the grounds stated; and direct a verdict for the plaintiffs as to the others.

Thereafter the court directed the jury to find a verdict for the plaintiffs for the sum of fifty thousand five hundred and sixty-three $\frac{44}{100}$ dollars.

To this direction and ruling of the court defendants counsel excepted, which exception was duly noted and allowed.

Under this direction of the court, the jury found a verdict for the plaintiffs in the sum of fifty thousand five hundred and sixty-three $\frac{44}{100}$ dollars.

And inasmuch as the defendants' said exceptions, matters and things aforesaid would not otherwise appear by the record,

Therefore, on the prayer of the defendants, by their counsel, I have settled, allowed, and signed this bill of exceptions.

190 And it is ordered that the same be filed nunc pro tunc as a part of the record herewith with like force and effect as if the same had been reduced to writing, signed, and filed before the same was given to the jury.

Witness my hand, at the city of New York, this 5th day of October, 1888.

E. HENRY LACOMBE.

And inasmuch as the plaintiffs' said exceptions and the matters and things aforesaid would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of said plaintiffs, by their counsel; and

It is ordered that the same be filed nunc pro tunc as a part of the record herein, with like force and effect as if the same had been reduced to writing, signed and filed before the case was given to the jury.

Witness my hand, at the city of New York, in the southern district of New York, this 5th day of October, 1888.

E. HENRY LACOMBE.

We hereby consent that the foregoing bill of exceptions be signed and filed as of October 5th, 1888, pursuant to stipulation heretofore made.

A. W. GRISWOLD,
Pl'ffs' Att'y.
STEPHEN A. WALKER,
U. S. Att'y, & Att'y for Def'ts.

191 (Indorsed:) United States circuit court, So. district of New York. Victor Fauché and Marius A. Sorchan, surviving partners of the firm of Lachaise, Fauché & Company, vs. Robert Schell, Edward Schell, and James W. Fellows, executors of the last will and testament of Augustus Schell, deceased. Plaintiffs' and defendants' joint bill of exceptions. Filed this 20th day of Oct, 1888, nunc pro tunc, as of Oct. 5, 1888, as per order of court.

192 Supreme Court of the United States.

ROBERT SCHELL, JAMES W. FELLOWS & EDward Schell, executors, &c., plaintiffs in error,
vs.
VICTOR FAUCHE & MARIUS A. SORCHAN, survivors, &c., defendants in error.
} Assignment of errors.

Afterwards, to wit, on the fourth Monday of October, in the same term before the justices of the said court, at the Capitol in Washington, come the said plaintiffs in error, by Stephen A. Walker, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record, aforesaid, it appears that the judgment, aforesaid, in form, aforesaid given, was given for the said defendants in error, against the said plaintiffs in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiffs against the said defendants.

And the said plaintiffs pray that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed annulled, and altogether held for nothing, and that (they) the said plaintiffs, may be restored to all things which (they) (have) lost by occasion of said judgment, &c.

STEPHEN A. WALKER,
Attorney for Plaintiffs in Error.

193 (Indorsed:) O. S., 324. United States Supreme Court. Robert Schell & al., executors, &c., plaintiffs in error, vs. Victor Fauché & ano., &c., defendants in error. Assignment of error. Stephen A. Walker, attorney for plaintiffs in error. Due service of a copy of the within assignment of error is hereby admitted this day of October, 1888. A. W. Griswold, attorney for defendants, defendants in error. To A. W. Griswold, attorney for defendants in error, U. S. circuit court. Filed Oct. 6, 1888. John A. Shields, clerk.

191 Supreme Court of the United States.

ROBERT SCHELL, JAMES W. FELLOWS, AND Edward Schell, executors of Augustus Schell, plaintiff in error,
vs.
VICTOR FAUCHÉ AND MARIUS A. SLORCHAN, surviving partners, defendants in error.
} Joinder in error.

And afterwards, to wit, on the fourth Monday of October, in said term, the said defendants in error, by A. W. Griswold, their attorney, come here into court and say that there is no error to the prejudice of the said plaintiff in error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in no respect reduced, &c.

A. W. GRISWOLD,
Attorney for Defendants in Error.

195 (Indorsed:) O. S. 324. United States Supreme Court. Robert Schell, James W. Fellows, and Edward Schell, executors of Augustus Schell, plaintiffs in error. Victor Fauché and Marius A. Sorchan, surviving partners, defendants in error. Joinder in error. A. W. Griswold, attorney for defendants in error. Due service of a copy of the within joinder in error is hereby admitted this 6 day of Oct., 1888. Stephen A. Walker, attorney for plaintiffs in error. To , attorney for plaintiff in error. U. S. circuit court. Filed Oct. 6, 1888. John A. Shields, clerk.

196 Supreme Court of the United States.

VICTOR FAUCHÉ AND MARIUS A. SORCHAN, surviving partners, plaintiffs in error,
vs.
ROBERT SCHELL, JAMES W. FELLOWS, AND Edward Schell, executors of August Schell, defendants in error.
} Assignment of errors.

Afterwards, to wit, on the fourth Monday of October, in the same term, before the justices of the said court, at the Capitol in Washington, come the said plaintiff in error, by A. W. Griswold, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit: that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said plaintiffs in error against the said defendants in error for the sum of $5,349,256, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendants for a much larger sum.

And the said plaintiff pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that (they) the said plaintiffs may be restored to all things which (they) (have) lost by occasion of said judgment &c.

A. W. GRISWOLD,
Att'y for Plaintiffs in Error, 11 *Pine St., New York.*

197 (Indorsed:) O. T. 324. United States Supreme Court. Victor Fauché et al., plaintiffs in error, vs. Robert Schell, et al., exr's &c., defendant in error. Assignment of error. A. W. Griswold, attorney for plaintiffs in error. Due service of a copy of the within assignment of error. is hereby admitted this 6th day of October, 1888. Stephen A. Walker, attorney for ——— in error. To Stephen A. Walker, esq., attorney for defendants in error. U. S. circuit court. Filed Oct. 6, 1888. John A. Shields, clerk.

198 Supreme Court of the United States.

VICTOR FAUCHÉ, MARIUS A. SORCHAN, survivors, &c., plaintiffs in error,
vs.
ROBERT SCHELL, JAMES W. FELLOWS, AND Edward Schell, executors of Augustus Schell, deceased, defendants in error.
} Joinder in error.

And afterwards, to wit, on the fourth Monday of October, in said term, the said defendants in error, by Stephen A. Walker, their attorney, come here into court, and say that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid, to the damage of the said plaintiffs in error.

And they pray that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEPHEN A. WALKER,
Attorney for Defendant in Error.

199 (Indorsed:) O. S. 324. United States Supreme Court. Victor Fauche & ano., survivors, &c., plaintiffs in error, vs. Robert Schell & al. executors, &c., defendants in error. Joinder in error. Stephen A. Walker, attorney for defendants in error. Due service of a copy of the within joinder in error is hereby admitted this 6 day of Oct., 1888. A. W. Griswold, attorney for plaintiffs in error. To A. W. Griswold, attorney for plaintiffs in error. U. S. circuit court. Filed Oct. 6, 1888. John A. Shields, clerk.

200 Circuit court of the United States of America for the southern district of New York, in the second circuit.

VICTOR FAUCHÉ ET AL.
vs.
ROBERT SCHELL ET AL., EX'RS., &C. } Bond for damages and costs.

Know all men by these presents, that we, Victor S. Allien, of the city of New York, and A. W. Griswold, jr., of the city of New York, are held and firmly bound unto the above-named Robert Schell &c., in the sum of two hundred and fifty dollars, to be paid to the said Robert Schell et al., &c., for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our seals, and dated the 5th day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas, the above-named Victor Fauché et al. have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States, for the southern district of New York.

Now, therefore, the condition of this obligation is such, that if the above-named Victor Fauché et al. shall prosecute their said writ of error to effect and answer all damages and costs, if they shall fail to make their plea good *good*, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

VICTOR S. ALLIEN. [L. S.]
A. W. GRISWOLD. JR. [L. S.]

Sealed and delivered, and taken and acknowledged this 5th day of October, 1888, before me,
J. M. DEUEL,
U. S. Com'r S. D. of N. Y.

201 UNITED STATES OF AMERICA, *ss*,
Southern district of New York.

Victor S. Allien and A. W. Griswold, jr., being duly sworn, each deposes and says that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

VICTOR S. ALLIEN,
A. W. GRISWOLD, JR.

Sworn to this fifth day of October, A. D. 1888, before me,
J. M. DEUEL,
U. S. Com'r S. D. of N. Y.

(Indorsed:) O. S. 324. U. S. circuit court, southern district of New York. V. Fauche et al. vs. Robert Schell et al. ex'rs. &c. Bond for costs on writ of error. Approved as to form and sufficiency Oct. 5, 1888. E. Henry Lacombe. U. S. circuit court. Filed Oct. 6, 1888. John A. Shields, clerk.

202 UNITED STATES OF AMERICA, *ss:*

To Victor Fauché & Marius A. Sorchan, survivors, &c., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the fourth Monday of October, eighteen hundred and eighty-eight, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Robert Schell, James W. Fellows, and Edward Schell, executors of Augustus Schell, deceased, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated, October 6, 1888.

ADDISON BROWN,
Judge.

203 (Indorsed:) O. S. 324. U. S. Supreme Court. Robert Schell, et al., &c., plaintiffs in error, against Victor Fauché, & ano, &c., defendants in error. Citation. Stephen A. Walker, attorney for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this day of Oct., 1888. A. W. Griswold, attorney for defendants in error. U. S. circuit court. Filed Oct. 6, 1888. John A. Shields, clerk.

204 UNITED STATES OF AMERICA, *ss:*

To Robert Schell, James W. Fellows, and Edward Schell, executors of Augustus Schell, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the fourth Monday of October, eighteen hundred and eighty-eight, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Victor Fauché and Marius A. Sorchan, surviving partners, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated October 6th, 1888.

ADDISON BROWN,
Judge.

(Indorsed:) O. S. 324. U. S. Supreme Court. Victor Fauché et al., plaintiffs in error, against Robert Schell et al., ex'rs, &c., defendants in error. Citation. A. W. Griswold, attorney for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this 6th day of Oct., 1888. Stephen A. Walker, attorney for defendants in error.

205 (Indorsed on cover:) S. New York, C. C. U. S. No. 690. Robert Schell, James W. Fellows, and Edward Schell, executors of Augustus Schell, deceased, late collector of the port of New York, plaintiffs in error, vs. Victor Fauché and Marius A. Sorchan, surviving partners of the firm of Lachaise, Fauché & Company. No. 691. Victor Fauché and Marius A. Sorchan, surviving partners of the firm of Lachaise, Fauché & Company, plaintiffs in error, vs. Robert Schell, James W. Fellows, and Edward Schell, executors of Augustus Schell, deceased, late collector of the port of New York. Filed October 23, 1888.

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Supreme Court U. S.
FILED.
JAN 6 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 690.

ROBERT SCHELL, &c., EXECUTORS, &c., PLAINTIFFS IN ERROR,

vs.

VICTOR FAUCHÉ, &c., DEFENDANTS IN ERROR.

AND

No. 166.

JOHN E. PARSONS, &c., EXECUTORS, &c.,

vs.

FEWSTER WILKINSON, &c.

Now come W. H. Taft, Solicitor General, &c., &c., upon behalf of the plaintiffs in error in the case above named, and S. F. Phillips, attorney for the defendants in error therein, and move the Court that the above case, No. 690, be substituted in the place of the above case No. 166, and be heard in its stead when the latter is called.

As a reason for such motion they submit that upon a decision of the questions involved in the case No. 690 seventeen (17) other cases upon the present docket, specified in a

stipulation now filed upon behalf of the parties thereto, will thereby be substantially ended, and therefore will be affirmed or reversed without further argument.

WM. H. TAFT,
Solicitor General.
S. F. PHILLIPS,
Attorney for the Defendants.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

Parsons, &c., *v.* Wilkinson, &c., No. 166.
Schell, &c., *v.* Johnson, &c., No. 423.
Schell, &c., *v.* Wise, &c., No. 424.
Schell, &c., *v.* Lottner, &c., No. 425.
Barney, &c., *v.* Hurlburt, &c., No. 426.
Barney, &c., *v.* Curtis, &c., No. 427.
Schell, &c., *v.* Sorchan, &c., No. 429.
Schell, &c., *v.* Iselin, &c., No. 431.
Schell, &c., *v.* Rickards, &c., No. 486.
Schell, &c., *v.* Morrison, &c., No. 487.
Schell, &c., *v.* Woodbridge, &c., No. 492.
Schell, &c., *v.* Bodart, &c., No. 494.
Schell, &c., *v.* Fauché, &c., No. 690.

The parties to the cases above named hereby stipulate that inasmuch as the bill of exceptions in the case Schell, &c., *v.* Fauché, &c., No. 690, presents substantially all of the questions that are presented in any of them, therefore, in the event that upon argument the judgment in the Fauché case shall be affirmed, then the judgments in all the cases above named shall also be confirmed; and, also, in the event that although the judgments in the Fauché case shall not be affirmed, nevertheless it shall be held that as to some of the

questions presented thereby no error exists, then the judgments in the cases first above named shall respectively be affirmed in the event that no decision upon any such question shall, upon applying its principle to such case, show error therein; and in the event that such decision so applied shall show error therein, such judgments respectively shall be reversed.

It is also stipulated that upon judgment being rendered in the above Fauché case, the writs of error in the *same case*, No. 691, and also in those of *Sorchan*, No. ~~429~~ 430; *Iselin*, No. 432; *Woodbridge*, No. 493; and *Bodart*, No. 495, shall also be dismissed.

January 3rd, 1891.

WM. H. TAFT,
Solicitor General, &c.
S. F. PHILLIPS,
Attorney for Def'ts in Error.

Office Supreme Court U. S.
FILED,
JAN 27 1891
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

ROBERT SCHELL, JAMES W. FELLOWS, and Edward Schell, executors of Augustus Schell, deceased, late collector of the port of New York, plaintiffs in error,
vs.
VICTOR FAUCHÉ AND MARIUS A. SORCHAN, surviving partners of the firm of Lachaise, Fauché & Company. } No. 690.

VICTOR FAUCHÉ AND MARIUS A. SORCHAN, surviving partners of the firm of Lachaise, Fauché & Company, plaintiffs in error,
vs.
ROBERT SCHELL, JAMES W. FELLOWS, and Edward Schell, executors of Augustus Schell, deceased, late collector of the port of New York. } No. 691.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE EXECUTORS OF AUGUSTUS SCHELL, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

ROBERT SCHELL, JAMES W. FELLOWS, and Edward Schell, executors of Augustus Schell deceased, late collector of the port of New York, plaintiffs in error,
vs.
VICTOR FAUCHÉ AND MARIUS A. SORchan, surviving partners of the firm of Lachaise, Fauché & Company. } No. 690.

VICTOR FAUCHÉ AND MARIUS A. SORchan, surviving partners of the firm of Lachaise, Fauché & Company, plaintiffs in error,
vs.
ROBERT SCHELL, JAMES W. FELLOWS, and Edward Schell, executors of Augustus Schell, deceased, late collector of the port of New York. } No. 691.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE EXECUTORS OF AUGUSTUS SCHELL, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK.

STATEMENT OF FACTS.

The case here presented is that arising out of a consolidated action comprising six several suits which were orig-

inally commenced, five in the superior court of the city of New York and one in the supreme court of the State of New York and all were removed to the circuit court of the United States for the southern district of New York.

The several suits were begun between September 1, 1857, and March 1, 1860.

The claim alleged against the United States is for overpayment of duties upon certain importations of mousseline de laines made by the copartnership of which the defendants in error in docket case No. 690 are the survivors.

The consolidated suit was tried in October, 1887, before Judge Lacombe and a jury, and a verdict was found for Fauché and Sorchan, the plaintiffs below, survivors as aforesaid, under the direction of the court, for $50,563.44. (Rec., p. 91).

Judgment was entered in favor of said plaintiffs, as surviving partners, etc., against the executors of Augustus Schell, deceased, late collector etc. October 6, 1888, for $53,492.56 damages and costs (p. 27).

The case is brought up on cross writs of error, each party filing a formal assignment of errors and a joinder in error and receiving citation.

It is a matter of general public knowledge that a long contention has been going on in the courts below in what have become known as the Mousseline Delaine Cases.

Much of the contention that has created this notoriety has been over the question whether mousseline delaines were, under the act of March 3, 1857 (11 Stats., 192), subject to 19 per centum, or to 24 per centum duty.

That question has been excluded from the case now at bar, as the record page 30, states that:

> At the trial it was stipulated by and between the respective parties to this action that mousseline delaines, composed of worsted, or of worsted with a satin stripe, were under the tariff acts of 1857 subject to a duty of 19 per cent., as claimed by the plaintiffs.

As the duty paid was 24 per cent., the court says in the opinion (p. 88, fol. 183):

> Concededly the duties are excessive; and that question is out of the case.

The only questions that appear to remain in this case are such as may be found to arise upon the admissibility of evidence and those relating to the importer's protest under the act of February 26, 1845 (5 Stats., 727), to its form and to its sufficiency, to its service and the method and time of service, and whether protests called prospective protests are authorized under said act, and generally as to the effect to be given to the respective protests appearing in the case.

The following schedule (Rec., pp. 30,31) presents with sufficient fullness for the purposes of this review the manner in which the questions presented arise.

> The following schedule shows the various importations, the character of the protests, and many particulars relating thereto:

Exhibit No. —.	Name of vessel.	Date of payment.	Date of protest.	Kind of protest.	Attached, separate, written on entry.	Whether recorded.
1	A. Decatur	July 25, 1857	July 25, 1857	Specific.	Attached	Not found.
2	Argo	" 29, "	" 27, "	"	Written on entry	Do.
3	Trenton	" 29, "	" 27, "	"	Attached	Do.
4	Rattler	" 29, "	" 27, "	"	Written on entry	Do.
5	Morning Star	Feb. 1, 1858	Jan'y 30, 1858	"	Attached	Jan. 30.
6	Admiral	" 11, "	Feb. 10, "	Prospective.	"	Feb. 10.
7	Logan	Mch. 26, "		No protest.		
8	Persia	June 24, "		No protest.		
9	Ariel	" 30, "	June 30, 1858	Specific	Attached	June 30.
10	Africa	July 10, "	July 9, "	"	"	Not found.
11	W. Frothingham	" 12, "	" 9, "	Prospective.	"	
12	Omega	" 20, "		No protest.		Do.
13	North Star	" 21, "	July 21, 1858	Prospective.	Attached	Do.
14	Vanderbilt	Aug. 3, "	Not dated	Specific	"	
15	Persia	" 5, "		No protest		Not found.
16	Arajo	" 10, "	Aug. 10, 1858	Specific	Attached	Do.
17	Galena	" 11, "	" 10, "	"	"	Do.
18	Saxonia	" 20, "	" 20, "	"	"	Do.
19	Ariel	" 27, "		No protest.		
20	Alps	" 30, "		No protest.		
21	Zurich	Sept. 11, "	Sept. 10, 1858	Specific	Attached	Not found.
22	North Star	Oct. 15, "		No protest		
23	Persia	" 27, "	Oct. 27, 1858	Specific	Attached	Not found.
24	Asia	Nov. 12, "	Nov. 12, "	"	"	Do.
25	Vanderbilt	" 17, "	" 17, "	"	"	Do.
26	Asia	Dec. 29, 1858	Dec. 28, 1858	Specific	Attached	Not found.
27	Fulton	Jan'y 6, 1859		No protest.		
28	Alps	" 13, "		No protest.		
29	Arago	Feb. 1, "	Jan. 31, 1859	Specific.	Attached	Not found.
30	New Orleans	" 3, "	Jan'y 29, "	"	"	Do.
31	Wm. Tell	" 3, "	" 1, "	"	"	Do.
32	Zurich	Feb. 16, 1859	Feb. 16, 1859	Specific	Separate	Feb. 16.
33	Lebanon	" 19, "	" 19, "	"	"	" 19.

34	Africa	" 23, "	" 23, "	"	"	" 23.
34½	Fulton	Mch. 1, "	Mch. 1, "	"	"	March 7.
35	Jura	" 7, "	" 7, "	"	"	Mar. 7.
36	Alps	Apl. 1, "	Apl. 1, "	"	Attached	Not found.
37	Corinne	" 13, "	" 11, "	"	"	Apl. 13.
38	Jura	" 29, "	" 28, "	"	"	Apl. 28.
39	Vanderbilt	May 23, "		No protest.		
40	Hammonia	June 6, "		No protest.		
41	F. Haynie	" 10, "	Not dated	Specific	Attached	Not found.
42	Harvest Queen	" 21, "		No protest.		
43	Ocean Queen	" 23, "		No protest.		
43A	Ocean Queen (amended entry)	July 26, "		No protest.		
44	Mary	June 30, "		No protest.		
44A	Mary (amended entry)	July 19, "		No protest.		
45	Vanderbilt	" 6, "		No protest.		
46	Ariel	" 21, "		No protest.		
47	Africa	" 22, "		No protest.		
48	Ocean Queen (amended entry)	Aug. 3, 1859	Aug. 3, 1859	Specific	Attached	Not found.
48A	" " " "	" 23, "		No protest.		
49	W. Frothingham	" 8, "	Aug. 5, 1859	Specific	Attached	Not found.
50	Vanderbilt	" 16, "	" 16, "	"	"	Do.
51	T. B. Bertram	" 24, "	" 24, "	"	"	Do.
52	Ariel	Sept. 2, "		No protest.		
53	Africa	" 3, "		No protest.		
54	Ocean Queen	" 16, "		No protest.		
55	Vanderbilt	" 27, "	Sept. 26, 1859	Specific	Attached	Oct. 3.
56	Fulton	Oct. 12, "		No protest.		
57	Africa	" 17, "	Oct. 17, 1859	Specific	Attached	Oct. 18.
58	Ocean Queen	" 26, "	" 26, "	"	"	Oct. 28.
58A	Ocean Queen	Oct. 26, 1859		No protest.		
59	Persia	Dec. 10, "	Dec. 9, "	Specific	Attached	Dec. 12.
60	Bremen	" 17, "	" 17, "	"	Separate	" 20.
61	Arabia	Aug. 20, 1858		No protest.		
62	Persia	Sept. 18, "		No protest.		

By section 2 of "An act making appropriations," etc., passed March 3, 1839 (5 Stats., 348), it is provided that moneys paid to a collector for unascertained duties, or duties paid under protest, shall be placed to the credit of the Treasurer of the United States, etc. The act continues:

> But whenever it shall be shown to the satisfaction of the Secretary of the Treasury that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector or person acting as such than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the overpayment directing the said Treasurer to refund the same out of any money in the Treasury not otherwise appropriated.

By "An act explanatory of an act," etc., passed February 26, 1845 (5 Stat., 727), the act of March 3, 1839, is referred to, and the right of trial by jury in customs cases is recognized. The concluding portion of this act is as follows:

> Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector to recover the amount of duties so paid under protest unless the said protest was made in writing and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.

Article 384 of the Treasury regulations in force at the time of this importation (Rec., p. 29) provided that:

> General protests against the exaction of duties are not admissible, the law requiring a protest to be made to the collector of the customs in writing, subscribed by the importer, or his duly authorized agent, at or before payment of the duties, setting forth distinctly and specifically his objections to the payment of the duties demanded. A general protest, it has been decided by the Department in conformity with judicial decisions, made on any one importation, can not be taken as extending and applying to future importations of a similar character.

Article 386 provided—

> Protests are not to be written on the entry, but on a separate paper, to be marked with the number of the entry to which it belongs and kept in a proper file arranged for that purpose.

Article 387 provided that—

> Whenever duties are paid under protest, collectors of the customs will have the protest carefully and accurately copied at length in a record to be kept for that purpose, properly compared, verified, and certified as a correct copy by the officer or officers making such comparison, the number and date of entry, name of importer, vessel, and description of merchandise in regard to which the protest is made, to be duly stated on the record for the purpose of identification. This precaution is deemed necessary as well for the protection of the importer as the United States in the event of the loss of the original protest by accident or otherwise.

ASSIGNMENTS OF ERROR.

1. It is submitted that the court erred in directing the jury to find a verdict for the plaintiffs below for the sum of $50,563.44. (Rec., p. 91, fol. 189.)

2. The court also erred in admitting Exhibit 5 in evidence, and in receiving the protest of said Exhibit 5, and erred as to the admission of each component part of said Exhibit 5, and also erred in admitting in evidence the twenty-six protests standing in the same position as that of Exhibit 5, and also erred in admitting said twenty-six exhibits in evidence, the full substance of the evidence here intended, appearing as follows (pp. 32, 36):

EXHIBIT No. 5.

Entry of merchandise imported by Lachaise, Fauche & Co., in the ship Morning Star, whereof Foster is master, from Havre.

NEW YORK, 30 *Jan'y*, 1858.

Marks.	Numbers.	Packages and contents.	Im.	Total.
L. F	2197 and 2202..	Six cases mousseline delaines...	.....	17, 933. 00
		Charges 15 ea.....	.....	90. 00
		Each pa'kge alike.....	.....	18, 023. 00
		Commission 3 per cent.....	.....	540. 69
		Francs.....	.....	18, 563. 69

Klm 3453. 24. 82872.
Pd. Feb. 1. W. D. R.

LACHAISE, FAUCHE & CO.

District and port of New York, consignee's, importer's, or agent's oath.

I, M. A. Sorchan, do solemnly and truly swear that the invoice and bill of lading now presented by me to the collector of New York are the true and

only invoice and bill of lading by me received of all the goods, wares, and merchandise imported in the *Morning Star*, whereof Foster is master, from Havre, for account of any person whomsoever for whom I am authorized to enter the same, that the said invoice and bill of lading are in the state in which they were actually received by me, and that I do not know nor believe in the existence of any other invoice or bill of lading of the said goods, wares, and merchandise; that the entry now delivered to the collector contains a just and true account of the said goods, wares, and merchandise, according to the said invoice and bill of lading; that nothing has been, on my part, nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise; and that if, at any time hereafter, I discover any errors in the said invoice, or in the account now rendered of the said goods, wares, and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly and truly swear, that to the best of my knowledge and belief, Bonjour, of Paris, owner of the goods, wares, and merchandise mentioned in the annexed entry; that the invoice now produced by me exhibits the actual cost, or fair market value, in France, of the said goods, wares, and merchandise, all the charges thereon, and no other or different discount, bounty, or drawback, but such as has been actually allowed on the same.

M. A. SORCHAN.

Sworn this 1 day of Feb'y, 1858, before me.

S. O. HUNT,
Collector.

(Usual owner's oath follows.)

To this entry as produced from the customhouse, attached by wafer, was a specific protest, duly signed by plaintiffs' firm, of which the following is a copy:

NEW YORK, *Jan'y* 30, 1858.

AUGUSTUS SCHELL, Esq.,
Collector of Customs:

SIR: We object to the classification of our "mousseline de laines," or "worsted mousselines," embraced in our entry per *Morning Star* marked L. F., Nos. 2197 a 2202, 6 cases, under Schedule C, thereby subjecting them to a duty of 24 per centum ad valorem, while we claim they are liable to 19 per centum only, and for the following reasons, viz:

Because the article of "worsted mousseline" or "mousseline de laine," being a manufacture composed wholly of worsted, is subject only to the duty imposed on worsted fabrics, viz, 19 per centum; that it has no connection with the article denominated and known among merchants and dealers in the article as "*de laines,*" which is specified under Schedule C, and which is composed of a *cotton warp and a worsted weft;* that the article of "*mousseline de laine,*" or "*worsted mousseline,*" was known among merchants and dealers in the article at and long before the passage of the tariff act of March 3, 1857, by that name, *as a manufacture of worsted,* and as an article *totally and entirely distinct* from the fabric manufactured of *worsted and cotton,* known among merchants and dealers in the article exclusively by the title or name of "*de laines;*" that the article known as "*mousseline de laine*" *is not manufactured* in this country, while the article known as "*de laine*" *is extensively produced here;* and it could not have been the intention of Congress to impose a *cotton* duty upon an article manufactured wholly of *worsted,* and which did not come in competition with an American product.

For these reasons we contend that we are entitled to enter and pay duty on the above-described goods at the rate of *duty imposed on manufactures of worsted*, and *protest against the payment of a higher* rate of duty.

Yours, &c.,

LACHAISE, FAUCHÉ & CO.

Plaintiffs' counsel then offered in evidence said entry and the protest attached thereto by wafer, to which the defendant's counsel objected, on the ground, first, that it did not appear that said protest had been served upon Collector Schell, as required by the protest, act of February 26, 1845; second, that, if so served, it did not appear that it had been so served at or before the payment of the duty sought to be recovered, as required by the same act.

These objections were overruled by the court, and to this ruling defendant's counsel duly excepted, which exception was noted and allowed.

The entry and said protest attached thereto were then admitted in evidence and marked Exhibit 5.

Like objections and rulings were made to each of the following importations, wherein a protest precisely like the protest Exhibit No. 5 had been presented, viz: Exhibit Nos. 9, 10, 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 36, 37, 38, 41, 49, 50, 51, 55, 57, 58, 59, 60, and like exceptions were duly taken, noted, and allowed on behalf of the defendants.

3. The court erred in receiving in evidence the entry, invoice, and protest marked Exhibit 6, and erred in admitting each of the papers composing said exhibit (Rec., pp. 39 to 41).

Plaintiff's counsel then offered in evidence entry, invoice, and protest by the Admiral, of February 11,

1858, marked Exhibit 6, the invoice of the merchandise mentioned therein, and the protest attached by wafer to said entry:

The protest in this instance consisted of two forms of protest, one printed on white, being like Exhibit No. 5, but unsigned, and the other on blue paper, the latter being pasted to the former and signed by plaintiffs' said firm. The two printed papers thus pasted together and signed, as aforesaid, were attached to the entry by a wafer and, read together, made the following:

NEW YORK, *Feb'y 10th.*

AUGUSTUS SCHELL, Esq.,
Collector of Customs:

SIR: We object to the classification of our "mousseline de laines," or "worsted mousselines," embraced in our entry per marked L. F., Nos. 2164 a 2196 under schedule C, thereby subjecting them to a duty of 24 per centum ad valorom, while we claim they are liable to 19 per centum only, for the following reasons, viz:

Because the article of "worsted mousseline" or "mousseline de laine," being a manufacture composed wholly of worsted, is subject only to the duty imposed on worsted fabrics, viz: 19 per centum; that it has no connection with the article denominated and known merchants and dealers in the article as "de laines," which is specified under Schedule *C*, and which is composed of cotton warp and worsted weft; that the article of "mousseline de laine," or "worsted mousseline," was known among merchants and dealers in the article, and long before the passage of the tariff act of March 3d, 1857, by that name, as a manufacture of worsted, and as an article totally entirely distinct from the fabric manu-

factured of worsted and cotton, known among merchants and dealers in the article exclusively title or name of "de laines;" that the article known as "mousseline de laine" is not manufactured in this country, while the article as "de laine" is extensively produced here; and it could not have been the intention of Congress to impose a cotton duty upon an manufactured wholly of worsted and which did not come in competition with an American product.

For these reasons we contend that we are entitled to enter and pay duty on the above described goods at the rate of duty imposed manufactures of worsted, and protest against the payment of a higher rate of duty.

Sir, we protest against paying duty on two and a half per centum or three per centum commissions as charged on the merchandise embraced in the annexed entry, believing by law said goods are liable only to duty on two per centum *commission*, that being the usual rate of commission in the principal markets of the country from which said merchandise is imported. We claim that we ought not to be prejudiced by the fact that two and a half per centum or three per centum is charged on the invoice, because that rate has been added by the consignor to conform to the requirements at the custom-house, and not because such commission was paid, or was the usual rate in the market whence the merchandise is imported.

We also protest against being compelled to pay duty on *commission* computed on the "*charges*" or *expenses* on the merchandise embraced in the annexed entry, believing commission is chargeable only on the cost of or market value of said merchandise without the "charges."

We also protest against paying fees for oaths to entries, stamps on invoices, and orders from one de-

partment of the custom-house to another, believing there is no provision of law requiring us to pay the same; and we pay the amount exacted on this entry in order to get possession of the goods. You are hereby notified that we desire and intend this protest to apply to all future similar importations made by us.

(A. W. G.)

LACHAISE, FAUCHÉ & CO.

To the admission in evidence of this protest, defendant's counsel made the same objections as were made to the admission in evidence of the protest attached to Exhibit I, and the *further objection* that the protest, as to delaines, appears never to have been signed, and that the *signature to the charges and commission protest printed on said blue paper* is not *a signature* to the delaine protest as required by the aforesaid protest act of 1845. These objections the court overruled, and to this ruling defendant's counsel excepted, which exception was duly noted and allowed. Thereupon said entry and invoice and protest by the Admiral were admitted in evidence and marked Exhibit 6.

4. The court erred in receiving in evidence entries Exhibits 11 and 13, accompanied by protests and erred in admitting each of the several protests and parts of such exhibits, the admission appearing as follows, page 41:

During the trial entries Exhibits Nos. 11 and 13, accompanied by protests in all respects like Exhibit 6, were offered in evidence. To each of these offers counsel for the defendant interposed the same objections as urged to Exhibit 6, which objections were overruled, and the exception of the defendants to the rulings of the court were duly noted and allowed.

5. The court erred in admitting Exhibit 7 and erred as to the admission of each component part of said exhibit, shown as follows:

> Plaintiffs' counsel also offered in evidence a withdrawal entry and invoice by the *Logan* of October 12, 1857, and marked Exhibit 7. No protest accompanied this entry, the *plaintiffs relying* for recovery upon the *prospective clause in the prior protest of Exhibit No. 6, claiming that the duties were covered by this protest, and that this protest, with its future clause*, was made *before July 1st*, 1864, when the act relating to prospective protests went into operation.
>
> Defendants' counsel objected to the admission in evidence of said entry and invoice by the *Logan*, on the ground—*First*, that the plaintiffs' firm had made no protest as to the duties exacted on the merchandise mentioned therein, and could not, therefore, recover under said protest act of February 26, 1845. *Second*, that they were not entitled to recover thereon under the mousseline delaine protest of Exhibit 6, because there is no future *clause found in that mousseline delaine part of the protest*, but such clause is found in the charges and commissions protest, and that the arrangement of these two protests and everything about them leads to the inference, until the contrary is shown, that the plaintiffs *never intended* to apply the *prospective protest clause in the charges* and *commissions protest* to the mousseline delaine protest, to which it is attached. And, *third*, that if such prospective clause be considered a part of the mousseline delaine protests, plaintiffs are not entitled to recover as to this entry under said protest act by virtue of such prospective clause.
>
> The court overruled these objections, and to this ruling defendants' counsel excepted, which exception

was duly noted and allowed. Thereupon the entry and invoice by the *Logan* were admitted in evidence, and marked Exhibit 7.

6. The court erred in admitting in evidence Exhibit 8, and erred in admitting each of the several portions thereof, such admission appearing as follows (pp. 41, 42):

> In the case of the importation Exhibit No. 8, no protest accompanied the entry. The plaintiffs relied and claimed as in case of the importation of Exhibit No. 7. To the admission in evidence of the entry and invoice of Exhibit No. 8, defendants' counsel made the same objections to the admission in evidence of the entry and invoice of Exhibit No. 8 as were made in case of those of Exhibit No. 7, which objections were overruled, and the exception of the defendants to the ruling of the court was duly noted and allowed.

7. The court erred in the admission of Exhibit 12, and erred in the admission of each portion thereof, the same appearing as follows (p. 42):

> In the case of the importation of Exhibit No. 12, no protest accompanied the entry, and the plaintiffs relied for recovery upon the prospective clause of the prior protest of Exhibit No. 6 and No. 11, claiming that the duties were covered by these protests, and that these protests with *future clause* were made *before July* 1, 1864, when the act relating to prospective protests went into operation. To the admission in evidence of the entry and invoice of Exhibit No. 12 defendants' counsel made the same objections, which objections were overruled and the exceptions of the defendants to the ruling of the court were duly noted and allowed.

8. The court erred in the admission of Exhibit 15, and as to the admission of each component thereof; and erred in admitting the evidence received in relation thereto, the same appearing as follows (p. 42):

> In the case of the importation of Exhibit No. 15, no protest accompanied the entry. Accompanying the prior importation of Exhibit No. 14, was a specific protest precisely like the protest of Exhibit No. 5. Plaintiffs relied for recovery as to Exhibit No. 15 upon the prospective clause of the prior protests of Exhibits No. 6, 11, and 13, claiming that the duties were covered by these protests and that these protests with future clauses were made before July 1, 1864, when the act relating to prospective protests went into operation. To the admission in evidence of the entry and invoice of Exhibits No. 15, defendants' counsel made the same objection and a further objection, that whatever the effect of the prospective clause of the protest of Exhibits No. 6, 11, and 13 might otherwise be, its effect was, under the authority of *Baxter* v. *Maxwell* (4 Blatch., 48), nullified by the intervening specific or special protest of Exhibit No. 14, which objections were overruled and the exceptions of the defendants to ruling of the court were duly noted and allowed.

9. The court erred in the admission of evidence as to each of the cases and exhibits mentioned and referred to in the following quotation from the record (p. 42), to wit:

> In the case of each of the importations of Exhibits Nos. 19, 20, 22, 27, 28, 39, 40, 42, 43, 43 A, 44, 44 A, 45, 46, 47, 48 A, 52, 53, 54, 56, 58 A, 61, 62, no protest accompanied the entry. Plaintiffs relied for

was duly noted and allowed. Thereupon the entry and invoice by the *Logan* were admitted in evidence, and marked Exhibit 7.

6. The court erred in admitting in evidence Exhibit 8, and erred in admitting each of the several portions thereof, such admission appearing as follows (pp. 41, 42):

> In the case of the importation Exhibit No. 8, no protest accompanied the entry. The plaintiffs relied and claimed as in case of the importation of Exhibit No. 7. To the admission in evidence of the entry and invoice of Exhibit No. 8, defendants' counsel made the same objections to the admission in evidence of the entry and invoice of Exhibit No. 8 as were made in case of those of Exhibit No. 7, which objections were overruled, and the exception of the defendants to the ruling of the court was duly noted and allowed.

7. The court erred in the admission of Exhibit 12, and erred in the admission of each portion thereof, the same appearing as follows (p. 42):

> In the case of the importation of Exhibit No. 12, no protest accompanied the entry, and the plaintiffs relied for recovery upon the prospective clause of the prior protest of Exhibit No. 6 and No. 11, claiming that the duties were covered by these protests, and that these protests with *future clause* were made *before July* 1, 1864, when the act relating to prospective protests went into operation. To the admission in evidence of the entry and invoice of Exhibit No. 12 defendants' counsel made the same objections, which objections were overruled and the exceptions of the defendants to the ruling of the court were duly noted and allowed.

8. The court erred in the admission of Exhibit 15, and as to the admission of each component thereof; and erred in admitting the evidence received in relation thereto, the same appearing as follows (p. 42):

> In the case of the importation of Exhibit No. 15, no protest accompanied the entry. Accompanying the prior importation of Exhibit No. 14, was a specific protest precisely like the protest of Exhibit No. 5. Plaintiffs relied for recovery as to Exhibit No. 15 upon the prospective clause of the prior protests of Exhibits No. 6, 11, and 13, claiming that the duties were covered by these protests and that these protests with future clauses were made before July 1, 1864, when the act relating to prospective protests went into operation. To the admission in evidence of the entry and invoice of Exhibits No. 15, defendants' counsel made the same objection and a further objection, that whatever the effect of the prospective clause of the protest of Exhibits No. 6, 11, and 13 might otherwise be, its effect was, under the authority of *Baxter* v. *Maxwell* (4 Blatch., 48), nullified by the intervening specific or special protest of Exhibit No. 14, which objections were overruled and the exceptions of the defendants to ruling of the court were duly noted and allowed.

9. The court erred in the admission of evidence as to each of the cases and exhibits mentioned and referred to in the following quotation from the record (p. 42), to wit:

> In the case of each of the importations of Exhibits Nos. 19, 20, 22, 27, 28, 39, 40, 42, 43, 43 A, 44, 44 A, 45, 46, 47, 48 A, 52, 53, 54, 56, 58 A, 61, 62, no protest accompanied the entry. Plaintiffs relied for

recovery and made the same claim as just stated, and to the admission in evidence of each of the entries and invoices of said exhibit the defendants' counsel made the same objections as just stated, which objections were overruled and the exceptions of the defendants to the rulings of the court duly noted and allowed.

10. The court also erred in admitting protests without date, as follows (p. 41):

> Plaintiffs' counsel then offered in evidence the entry by the *Vanderbilt*, of August 3, 1858, marked Exhibit 14, the invoice of the merchandise mentioned therein, and a protest attached thereto, without date, of the same form as the protest of Exhibit 5, and duly signed by the plaintiffs' firm.
>
> To the admission in evidence of this protest defendants' counsel made the same objections as were made to the admission in evidence of the protest of Exhibit No. 5, and the further objection that the protest was without date. These objections were overruled by the court, and to this ruling the defendants' counsel excepted, which exception was duly noted and allowed.

11. The court also erred in the admission of undated protests in evidence, as follows (pp. 42, 43):

> To the admission in evidence of each of the protests of Exhibits Nos. 16 and 41, which were each of the same form as the protest of Exhibit No. 5, but without date, the defendants' counsel made the same objection, which objections were overruled and the exceptions of the defendants' counsel to these rulings of the court duly noted and allowed.

12. The court also erred in admitting in evidence nine answers from the Secretary of the Treasury as to appeals shown, as follows (p. 63):

> Plaintiffs' counsel then offered in evidence nine answers to appeals in case of importations in suit made by the plaintiffs' firm, as an admission that at the time those appeals were answered the Secretary of the Treasury was informed by the collector, or the collector admitted the filing of the protests.
>
> To the admission in evidence of each of these nine answers the defendants' counsel objected, on the ground, first, that it was incompetent and immaterial; and second, that it referred in terms to the protest act of 1857, not to the protest act of 1845, which applies to the importations in suit. The court overruled these objections and stated that he would admit them in evidence for what they were worth. To this ruling of the court the defendants' counsel excepted, which exception was duly noted and allowed; and the said answers were admitted in evidence and marked Exhibit 70 to 78, both inclusive.

13. The court erred in denying defendants' motion to instruct the jury to find for the defendants as to cases 761 and 762 of Exhibit 52, on the ground, first, that the same were delivered on the payment of 19 per cent. duty, and the 5 per cent. additional duty now sought to be recovered having been paid after the delivery thereof was not paid, if at all, to get possession of the goods as required by the act of 1845; and, second, on the ground that there is no proof that the part of such additional duties not heretofore disclaimed, but now claimed to be recovered, was paid. (P. 83, fol. 170.)

14. The court erred in denying defendants' motion to instruct the jury to find in favor of defendants as to Exhibits 1 and 2, on the ground that the character of the importations of said exhibits is not shown, or the rate of duty to which they or any of them were subject; second, that the protests do not distinctly and specifically set forth the ground or grounds of objection to the payment of the duties exacted, as required by statute. (P. 83, fol. 171.)

15. That the court erred in denying defendants' motion to instruct the jury to find a verdict for the defendants as to each and every importation mentioned in the sixty-two exhibits, except those of Exhibits 3 and 4, on the ground that it does not appear that the payment of duty sought to be recovered was made to get possession of any of said importations or any part thereof; second, that it does not appear that any protest against the payment of any part of the duties now sought to be recovered was ever served upon the collector, who exacted them as required by the statute; and, third, that if any protest was so served, it does not appear that the same was served at or before the payment of such duties, as required by the aforesaid act. (Pp. 83, 84, fol. 172.)

16. That the court erred in denying defendants' motion to instruct the jury to find for defendants as to the importations mentioned in Exhibit No. 6, on the ground that the mousseline delaine protest attached to the entry of said exhibit, upon which the plaintiffs relied to recover, was unsigned, and that the signature of plaintiff's firm to the charges and commission protest pasted onto such mousseline delaine protest was not a signature by the

claimants, plaintiff's firm, of such mousseline delaine protest as is required by the aforesaid act of February 26, 1845. (P. 84).

17. That the court erred in denying defendants' motion to instruct the jury to find for the defendants as to the importations mentioned in Exhibit 11 on the same grounds as those stated in the last preceding assignment of error (p. 84).

18. That the court erred in denying defendants' motion to instruct the jury to find for the defendants as to the importations mentioned in Exhibit 13, on same grounds as those stated in assignment of error No. 16.

19. That the court erred in denying defendants' motion to instruct the jury to find for the defendants as to the importations mentioned in Exhibits 7 and 8 on the ground, first, that no protest was ever made as to either of said importations, as required by the aforesaid protest act; second, that notwithstanding the prospective clause of the signed charges and commissions protest pasted on to the unsigned mousseline delaine protest attached to the entry of Exhibit 6; said prospective clause is a part of the charges and commissions protest only, and in no way applies to, or is a part of the unsigned mousseline delaine protests to which such charges and commissions protest is pasted (p. 84, fol. 173).

20. The court erred in denying defendants' motion to instruct the jury to find for defendants as to the importations mentioned in the entry of Exhibit 12, on the ground, first, that no protest was made as to any of such importations as required by the act of 1845; second, that notwithstanding there is a prospective clause in each of the signed

charges and commissions protests pasted on to each of the unsigned mousseline delaine protests attached to the Exhibits 6 and 11, such prospective clause is a part of its respective charges and commissions protests only, and in no way applies to, or is any part of the unsigned mousseline delaine protest to which its charges and commissions protest is pasted (p. 84, fol. 174).

21. That the court erred in denying defendants' motion (pp. 85, 86) to instruct the jury to find in the defendants' favor as to the importations mentioned in Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 43*a*, 44, 44*a*, 45, 46, 47, 48*a*, 52, 53, 54, 56, 58*a*, 61, and 62, on the ground, first, that no protest was made as to any of such importations as required by the act of February 26, 1845, and, second, notwithstanding there is a prospective clause in each of the charges and commissions protests pasted onto each of the unsigned mousseline delaine protests attached to the plaintiffs' prior, in time, entries of Exhibits 6, 11, and 13, such prospective clause is a part of its respective charges and commissions protests only, and in no way applies or is a part of the unsigned mousseline delaine protests to which its charges and commissions protest is pasted; and, third, that the effect of any such prospective clause as to each of the aforesaid subsequent unprotested importations of plaintiffs' Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 43*a*, 44, 44*a*, 45, 46, 47, 48*a*, 52, 53, 54, 56, 58*a*, 61, and 62 was, under the principle laid down in the decision of *Baxter* vs. *Maxwell* (4 Blach., 32), nullified by intervening specific mousseline delaine protest without prospective clause as follows: As to Exhibits 19 and 20 by the specific protest of Exhibits 14, 16, 17, 18, and the inter-

vening unprotested importation of Exhibit 15 as to Exhibit No. 22 by the specific protest of Exhibits 14, 16, 17, 18, and 21, and the intervening unprotested importations of Exhibits 15, 19, and 20; as to Exhibit 27 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, and 26, and the intervening unprotested importations of Exhibits 15, 19, 20, and 22; as to Exhibit 28 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, and 26, and the intervening unprotested importations of Exhibits 15, 18, 20, 22, and 27; as to Exhibit 39 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, and 28; as to Exhibit 40 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, and 39; as to Exhibit 42 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, and 40; as to Exhibit 43 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, and 42; as to Exhibit 44 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, and 42; as to Exhibit 44

by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, and 43; as to Exhibit 44*a* by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 43, and 44; as to Exhibit 45 by the intervening specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 29, 40, 42, 43, 44, and 44a; as to Exhibit 46 by the intervening specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, and 45; as to Exhibit 47 by the specific protests of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, and 41, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, 45, 46; as to Exhibit 52 by the specific protests of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, 41, 48, 49, 50, 51, and the intervening unprotested importations, Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, 45, 46, and 47; as to Exhibit 53 by the specific protests of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, 41, 48, 49, 50, and 51, and the intervening

unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, 45, 46, 47, 48a, and 52; as to Exhibit 54 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, 41, 48, 49, 50, and 51, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, 45, 46, 47, 48a, 52, and 53; as to Exhibit 56 by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, 41, 48, 49, 50, 51, and 55, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, 45, 46, 47, 48a, 52, 53, and 54; as to Exhibit 58a by the specific protest of Exhibits 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 34½, 35, 36, 37, 38, 41, 48, 49, 50, 51, 55, 57, and 58, and the intervening unprotested importations of Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 44, 44a, 45, 46, 47, 48a, 52, 53, 54, and 56; as to each of Exhibits 61 and 62 by all of the already mentioned specific protests, together with those of 59 and 60, and all of the already mentioned unprotested importations.

22. That the court also erred in denying defendant's motion (pp. 86, 87) to instruct the jury to find for defendants as to the importations, mentioned in the entries of Exhibits 1, 2, 10, 11, 13, 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 36, 41, 49, 50, 51, on the ground, first, that each of the protests now written on, or attached to, or detached and separate therefrom and alleged to relate to said exhibits, and to have been found on the files of the customhouse are none of them recorded in the pro-

test books in which protests are recorded, and therefore appear never to have been served upon the collector or on any authorized agent of the collector; second, that there is neither proof nor stipulation in this case that any of said protests were ever served upon any collector, or any authorized agent of his; third, that if so served there is no proof or stipulation in the case that any of said protests were so served on the collector, or his authorized agent, at or before the payment of the duty now sought to be recovered; and, fourth, that as to none of said importations does the prospective clause of the pasted protest on each of the unsigned mousseline protests attached to Exhibits 6, 11, and 13 entitle the plaintiffs to recover, for the reasons already mentioned in defendants' motion for the verdict as to said Exhibits 6, 11, and 13; and fifth, that if otherwise the plaintiffs would be entitled to recover by virtue of the prospective clause of said pasted charges and commissions protest of Exhibits 6, 11, and 13, the effect of such prospective clause, if any, was, under the principle laid down in the decision of *Baxter* v. *Maxwell* (4 Blatchford, 32), nullified as to all of the importations as to which this motion is made, except those of Exhibits 1 and 2, by the various intervening specific protests without prospective clauses, and by the various intervening unprotested entries.

23. That the court erred in denying defendant's motion to instruct the jury to find in defendant's favor as to the importations mentioned in Exhibits Nos. 14 and 41, on the ground that each of the protests upon which the plaintiffs relied to recover as to the same was undated, and there is neither proof nor stipulation in this case that any

of said protests was ever served upon the collector, or if so served, was so served at or before the payment of the duties now complained of, as required by the act of February 26, 1845. (P. 87.)

POINTS.

It is accepted law that Congress may fix the conditions upon which merchandise may be imported into the country.

The doctrine is also established that the Government may fix the conditions as to suits permitted to be brought against it or to reach its funds, and may define the limitations of such suits. The act of February 26, 1845 (5 Stat., 727), it is generally understood, was passed in consequence of the decision of *Carey* v. *Curtis* (3 Howard, 236), which was decided in 1844, and which held that an action for money had and received could not be maintained against the collector for payments of excessive duties made by importers under protest under the act of 1839.

The act of 1845 evidently intends to provide—

> First. For persons who have paid money, as and for duties under protest, to any collector of the customs, etc.; and,
>
> Second. For persons who shall hereafter pay money, as and for duties, under protest, to any collector of the customs, * * * in order to obtain goods, wares, or merchandise imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law.

In each case the importer may maintain his action at law against the collector.

Then follows the provision:

> Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, *unless the said protest was made in writing, and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.*

I.

THE SECOND ASSIGNMENT OF ERROR.

This assignment presents the question of exhibits produced and received in evidence without proof of the due service of the protests attached upon the collector; and subject to the objection, if service be inferred, that it does not appear that the protests were served before the payment of the duties sought to be recovered.

It is respectfully submitted that the admission of these exhibits in evidence was error. The exhibits covered by these objections, are Nos. 5, 9, 10, 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 36, 37, 38, 41, 49, 50, 51, 55, 57, 58, 59, 60.

II.

EXHIBITS 6, 11, AND 13.

The plaintiffs below put in evidence, against objections, the entry, invoice, and protest in each of these three cases.

The document put in as a protest consisted of two forms of protest pasted together. The first was a white paper,

and was a special mousseline de laine protest, pure and simple, and was unsigned. (Pp. 39, 41.) Pasted immediately below it was a charges and commissions protest, which was signed by the plaintiffs below.

The concluding portion of the last, or charges and commissions protest, immediately above the signature, is as follows:

> You are hereby notified that we desire and intend this protest to apply to all future similar importations made by us.

The questions raised by admitting these exhibits are presented by the third, fourth, sixteenth, seventeenth, and eighteenth assignments of error. The objections are, in substance—

(1) That the protests are not shown to have been duly served.

(2) That they are not shown to have been served at or before the payment of the duty sought to be recovered.

(3) That the protest as to delaines appears never to have been signed, and that the signature to the charges and commissions protest is not a signature to the delaine protest as required by the act of 1845.

The requirement of the statute prohibiting the maintaining of an action to recover, "unless the said protest was made in writing and signed by the claimant," is not complied with by such pasted work.

The mousseline delaine form is neither made in writing nor signed by the claimant.

The safeguards against fraud incorporated into the act are practically eliminated from it by the loose practice claimed.

An evil-disposed person might very readily change the character and effect of any protest having a prospective memoranda, by pasting above it such form as he wished to use.

The mousseline delaine protest is one thing and the charges and commissions protest is another; the signing of the latter under the restrictive intent of the act of 1845 is not a signing of the former.

III.

EXHIBITS NOS. 1 AND 2.

Assigment of error 14.

The protests appearing as parts of Exhibits Nos. 1 and 2 (pp. 36, 37) specify the grounds of the importers' objection in the following words:

> SIR: We hereby protest against the payment of a duty of 24 per cent. charged by you on worsted stuff goods, claiming that under existing laws said goods are only liable to a duty of 19 per cent. as a manufacture of worsted.

These clauses are precisely the same words as are employed in the protests of Exhibits Nos. 3 and 4 (pp. 38, 39), except in the latter the last five words above quoted do not appear.

Under the ruling in this case (Rec., p. 83, fol. 171), it is submitted, the jury should not have been directed to find in favor of plaintiffs below as to Exhibits 1 and 2.

IV.

ADMISSIONS OF SERVICE OF PROTESTS BY THE SECRETARY OF THE TREASURY.

The twelfth assignment of error presents the question of the admission of nine letters of the Secretary of the Treasury, appearing on pages 63 to 67 of the Record.

They were offered as evidence of admissions against the defendants below as tending to prove the service of the protests in the several cases of the importations referred to in the letters.

The court "stated that he would admit them for what they were worth."

It is submitted that they were neither competent nor relevant; that said defendants may have been injured thereby, and that their admission was error.

V.

UNDATED PROTESTS.

The tenth, eleventh, and twenty-third assignments of error relate to the undated protests attached to Exhibits 14 and 41.

They are attacked when presented in evidence, and upon a motion to direct the jury to find against the recovery claimed upon them—upon the grounds that each was undated, that it did not appear that either was ever served, nor that either was served at or before the payment of the duties now complained of.

It is submitted that an undated protest is not one conforming to the requirements of the statute.

VI.

THE QUESTION OF THE NONRECORDING OF THE PROTESTS.

Assignment of error 22, in addition to the questions arising out of prospective protests, intervening protests, and pasted protests, which are submitted, as to these exhibits, and will be considered in another connection, presents the question of the effect to be given to the nonrecording in the protest books of the custom-house of the protests put in evidence in connection with exhibits Nos. 1, 2, 10, 11, 13, 14, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 36, 41, 49, 50, 51.

These exhibits, with the protests, were produced upon a *subpœna duces tecum* issued on the part of the plaintiffs below to the collector (p. 30), and it is not contended here that such custody and production would not create the legal inference that these protests are genuine, and that they were served; but the practice of the collector's office and the provisions of article 387 of the Treasury Regulations required that the protest should be copied in a record to be kept for that purpose (p. 30).

Books were kept for the purposes of such record, and these books, covering the period of the importations under consideration, were produced upon the trial, showing the entry thereon or a memorandum of a large number of protests served upon the collector and noted upon these books; but no record or memoranda relating to any protest of any of the above-named exhibits was to be found upon any of them.

It is submitted that as no direct proof of the service of these protests exists, the fact that none of them were recorded in accordance with the custom and the regulations tends to do away with the inference drawn from the custody of the exhibits and protests and to indicate that the protests never were served upon the collector.

Therefore, while the jury might have found that these protests were served they should not have been instructed to find in favor of plaintiffs below upon them.

VII.

THE TWENTY-FIRST ASSIGNMENT OF ERROR.

There is no protest found, nor is there any record or any reference in the protest books of the custom-house indicating that any protest was served in the cases of either of the following exhibits: Nos. 15, 19. 20, 22, 27, 28, 39, 40, 42, 43, 43*a*, 44, 44*a*, 45, 46, 47, 48*a*, 52, 53, 54, 56, 58*a*, 61, and 62.

The protest on exhibit No. 6 was attached by a wafer and consisted of two forms of protest, one being on white paper and unsigned and the other on blue paper, the latter being pasted to the former and signed by the importers. The two printed papers were attached to the entry by a wafer. (Rec., pp. 39, 40.)

The first paper is plainly a blank for a specific mousseline delaine protest. This is unsigned.

Then follows a charges and commissions protest, a paper of a different color, and commencing with the address "Sir," and relating by its terms to only charges and commissions.

The conclusion of this paper is as follows:

> You are hereby notified that we desire and intend this protest to apply to all future similar importations made by us.

Then follows the signature of the importers. It appears that the concluding clause of the second paper contains the only suggestion to be found in either of a prospective protest.

No reference is made in either to the other.

The first paper appears to be merely a printed form, and a fair inference is that there is no written matter upon it unless it may be the words "Feby. 10th," and the "Nos. 2164*a* 2196." It will be noticed that neither the year nor the name of the vessel is stated.

Upon page 41 appears the following statement:

> During the trial entries Exhibit Nos. 11 and 13, accompanied by protests in all respects like Exhibit 6, were offered in evidence. To each of these offers counsel for the defendant interposed the same objections as urged to Exhibit 6, which objections were overruled, and the exception of the defendants to the rulings of the court were duly noted and allowed.

An examination of the schedule (pp. 30, 31) shows that these three exhibits are the only ones of the sixty-two importations which bear any notice of prospective protest whatever. Exhibit No. 14 has a specific protest attached to the entry.

Exhibit No. 15 has no protest appearing anywhere, and the same fact appears as to Exhibits Nos. 19, 20, 22, 27, 38, 39, 40, 42, 43, 43*a*, 44, 44*a*, 45, 46, 47, 48*a*, 52, 53, 54, 56, 58*a*, 61, and 62.

As no claim has ever been made that any specific protest, however served, has any prospective effect, it follows that the claim for a repayment of duties on these twenty-four specified exhibits, after No. 13, is based upon the prospective clauses appearing in the charges and commissions form of the pasted papers of exhibits Nos. 6, 11, and 13; or is based on such clause or clauses of one or more of said three exhibits.

The opinion of the court below holds that, practically, all of the subsequent exhibits containing no protest, twenty-seven in number, are covered by the prospective clause of Exhibit 6 (p. 90, fol. 187).

It is respectfully submitted that the statute of February 26, 1845, does not call for this construction.

As to each of these twenty-seven exhibits there is no protest against paying the money demanded upon that importation.

It is respectfully submitted to the consideration of this court that the intent of the act is that the importer shall pay the money to get the goods; that the necessity for payment, the purpose of payment, the payment, and the specific protest against payment are, in the contemplation of this law, all necessary parts of the one transaction required by the statute and are necessary to be completed before the right to maintain suit can exist.

The general clause above quoted, even if in a signed paper, dated and served February 10, 1858, is no "protest made in writing" in the case of the importation by the *Ocean Queen* October 26, 1859, according to the usual construction of language.

The words "at or before the payment of said duties" in the act have reference to the duties paid *under* protest, to any collector, in order to obtain the goods, as provided in the earlier portions of the law, and while recognizing with due deference the decisions that have been made by eminent judges in the circuit courts holding to the contrary, it is respectfully submitted that it is a matter of grave doubt whether Congress did not intend that such protest should not only be in writing and signed, but that the protest should be made at or before the payment; that is, that it should be made *upon the payment*, that it should be made then and there. Not that the protest might be made afterwards, or at another time, or in general terms, or on some previous occasion, but that it should be made at *or before the payment* and in connection with payment.

The protest is against "*the payment of said duties*" on goods actually or constructively present. The protest is by the "*claimant*" of the goods to the duties demanded, upon which he objects, and he is to set forth "the grounds of objection to the payment thereof."

VIII.

QUESTIONS ARISING UPON THE PROTESTS IN THIS CASE

These questions are presented upon admissions of evidence under the objection of defendants below and upon motions made in their behalf for instructions to the jury, and appear in detail in the fifth, sixth, seventh, eighth, ninth, nineteenth, twentieth, and twenty-first assignments of error.

Among these questions are those arising upon the pasted forms of protest of Exhibits Nos. 6, 11, and 13, and those relating to the signing of said exhibits, and those that grow out of the clauses called the prospective clauses of the said three exhibits, and those as to the effect of the intervening special protests, and also such as may arise from intervening unprotested importations.

The presentation of this case for review in pursuance of the writs of error issued renders it proper and even necessary to ask this court to consider and pass upon the question of prospective protests in connection with the forms of such protests used and with the manner of the signing of the same, and with the effect to be given to the repeatedly intervening special protests and to the repeatedly intervening unprotested importations.

The doctrine held by the court below upon the trial of this suit, that the prospective protests set forth in clauses attached to special protests are sufficient protests as to all similar importations made by the same importer is now and has been for a long time settled law in that court.

The court below, in the opinion, refers to the case of *Marriott* v. *Brune* (9 How. 619), and says (p. 87):

> The decision in the Marriott case is very carefully guarded by the court. It is restricted to the facts before it.
>
> The court expressly says in the opinion that the amount is very small; that there was a common understanding between the collector and the importer that these protests were good generally, and that the money paid for duty had not been covered into the Treasury. I should not consider that decision as

> sufficiently authoritative to require the ingrafting upon the act of 1845 of the doctrine of prospective protests.
>
> I do not see that that act contemplated any such method of protest.

It is believed that there is no case in the Supreme Court that is claimed to authorize or recognize prospective protests under the act of 1845, except that of *Marriott* v. *Brune*.

It is believed that, so far as this court is concerned, no approval has ever been expressed as to any prospective protest under the act of 1845, except this cautious and very guarded assent that appears in the concluding clause of *Marriott* v. *Brune*, decided at the December term, 1849. The clause is as follows:

> The question as to the subsequent entries being covered by this protest is not so clearly in favor of the importer, but as they all depend upon a like principle—as from the circulars of the Department some doubt existed whether the excess of duties would not voluntarily be refunded—as the amounts in each importation were small, and both parties became fully aware that the excess in all such cases was intended to be put in controversy and reclaimed, we are inclined to think this written protest may fairly be regarded as applying to to all subsequent cases of a like character, belonging to the same parties.

In *Warren* v. *Peaslee* (2 Curt., C. Cls. Rep., 231), the court (Curtis, J.) states the objects of the statute of 1845, and says (235):

> It is apparent that each of these objects will be attained very imperfectly, if at all, by allowing one general protest to be made and apply through all

> coming time, to all similar importations made by the importer. I think such a mode of protesting is far too vague to meet the requirement of the act. It would not be in conformity with any known course of proceeding in similar cases. The grounds of objection to the particular payment sought to be recovered back, must be not only distinctly, but specifically set forth. And it must be applied to that particular payment. Here is a protest which the importer says is to apply to *all future similar importations.*

In *Ullman* v. *Murphy* (11 Blatchf., 354), Judge Woodruff, while yielding to the weight of authority in his district, yet very distinctly expresses his disapproval of the doctrine of prospective protests.

In *Baxter* v. *Maxwell* (4 Blatchf., 32 (39), Judge Hall in the opinion says: "The case of *Marriott* v. *Brune* was peculiar, and certainly should not be extended."

A prospective clause adjoined to a specific protest is no part of that protest.

It does not relate to the importation in hand but looks wholly to future ventures and operations.

If valid, it reaches forward to results that can neither be defined nor computed. If such prospective protests are allowed the importer would be enabled to enter a protest initiating a claim against the Government upon fabrics, materials, or merchandise which he did not then own; and upon such as he might subsequently decide to import; and upon those manufactured or purchased in countries other than that of the protested importation, and upon those that had no existence at all at the time of the giving of the notice.

The theory of the statute seems to be that the collector and the Secretary of the Treasury shall have notice of any and every claim made for a refund of this kind at the time the importation is made, but the benefit to arise from such notice is lost by the practice of prospective protests.

One result of permitting a prospective protest is to escape the very thing that the act was made to exact, viz: The necessity of setting forth by the importer distinctly and specifically his grounds of objection to the payment of the duties when he makes payment to obtain his goods.

To illustrate the argument as to the use of protests in this case we will take *the case of the importation by the steamer Africa* (*Ex. No.* 53). The date of alleged payment of duty is September 3, 1859. No protest of any kind appears.

No record of any protest is found on the protest books of the custom-house. No one of any of the ten letters of Secretary Cobb makes any reference to the importation. It is held that the Government is liable upon the entry and invoice by the bare existence of the pasted special protests with the so-called prospective clause appearing at the end of the charges and commissions protest of Exhibits 6, 11, and 13, dated, respectively (as the schedule claims), February 11, July 9, and July 21, 1858, the latest one being more than a year prior to the importation of Exhibt No. 53 in question.

The question as to this exhibit is raised by the ninth assignment of error and also by the twenty-first assignment. It is shown (p. 42, fol. 83, 84) that this exhibit is one of a class of 23, standing in the same relation, and it is stated

that plaintiffs relied for recovery upon the prospective clauses of Exhibits 6, 11, and 13. On pages 70 and 71 the witness Kelly describes the examination he had made of seven protest books covering the period of the importations under examination.

On page 74, folio 152, the witness says: "That in the case of Exhibit 53 he found no protest and no record of one." The importation covered by this exhibit goes to make up the judgment entered against the executors of Schell. It is not found that there is any evidence in the case tending to show that any protest was ever made in connection with this exhibit. The court below must have held Fauché *et al.*, entitled to recover merely upon the entry and invoice and old protests.

The court must have also held that the making and serving of the three sets of pasted papers, called protests, attached to Exhibits 6, 11, and 13, rendered the payment of the duties on Exhibit 53, paid to get possession of this importation by the claimant of said goods, a payment under protest, as required by the statute of 1845; and that such payment constituted the 13-months-old protest of the makeup as shown, a protest applicable to Exhibit No. 53; that is to say, one that *was made in writing and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment of the duties paid under Exhibit* 53, and the court must have held this notwithstanding the fact that the special protest of Exhibits 6, 11, and 13 were dated more than 13 months previous to the date of this importation of Exhibit 53, and the fact that these special protests had spent their force, as

such, long before the importation of September 3, 1859, and notwithstanding the fact that those protests applied to importations by other vessels, and the fact that more than twenty strictly special intervening protests had been filed between July 21, 1858, and September 3, 1859, by these importers upon similar importations made by them, and the further fact that nearly as many nonprotested importations of similar goods by these importers intervened between Exhibit No. 13 and Exhibit No. 53, notwithstanding all of these objections to the force of the protests of Exhibits 6, 11, and 13, the court held those protests to be good, valid, and effective protests in the specified case of Exhibit No. 53, under the act of 1845.

This case of the exhibit No. 53 represents more than one-third in number of the exhibits set forth in the schedule. As to some of the items some further evidence may appear, but Exhibit No. 53 is a fair exponent of the class, and although the details are not given in the bill of exceptions, it is a necessary deduction that a considerable portion of the judgment rendered upon the verdict directed and found is made up of the amounts carried by these exhibits.

It should be noted that the fact that the importer himself ignores his claim under the general clause and indicates his purpose to abandon it by repeatedly serving specific protests is given no consequence.

Although alternating periods of special protesting and of nonprotesting succeed each other, it is held that the early pastest protest is and remains vital whenever the importers' interests require its application.

In view of the fact that the distinguished judge before whom this case was tried was constrained to allow these protests, not on his opinion of the meaning of the act, but in deference to the weight of authority in his circuit; and in view of the fact of the importance of the six suits here consolidated, and of the still greater importance of those dependent upon the issue of this suit; and in view of the fact that able jurists have entertained very grave doubts of the legality of such protests, and in view of the fact that since the use of such protests became frequent, this court has not been called upon to announce its decision in relation thereto; it is believed that, without blamable presumption, the questions connected with these protests may be placed before this court for review, notwithstanding the high character of the courts that have held, in differing cases, and for a long period, prospective protests not dissimilar to these to be legal, and notwithstanding the eminence, integrity, and learning of those who declared and those who have maintained that legality.

PART 2.

ROBERT SCHELL ET AL. IN DEFENSE.

The case of the plaintiffs below as plaintiffs in error here arises upon Exhibits 3 and 4. The protests in each of these two cases are alike, and are as follows:

NEW YORK, *July* 27, 1857.

AUGUSTUS SCHELL, Esq.:

SIR: We hereby protest against the payment of a duty of 24 per cent. charged by you on worsted stuff goods, claiming that under existing laws said goods are only liable to duty of 19 per cent.

> We pay the amount exacted to obtain possession of the goods, claiming to have the difference of duty refunded to us.
>
> Yours, respectfully,
>
> LACHAISE, FAUCHÉ & Co.

(pp. 38, 39.)

The court directed the jury to find in favor of the defendants as to the claims made upon these exhibits by the plaintiffs below upon the defendant's motion, alleging that there is no proof in the case or stipulation therein as to the character and material of the importations of said exhibits, or as to the rate of duty to which they, or any of them, should be subject under the law in force at the time of importation; second, that neither of said protests distinctly and specifically set forth the ground or grounds of objection to the payment of the duties exacted, as required by the act of February 25, 1845. (p. 83, fol. 171.)

And the court says (p. 85):

> As to Nos. 3 and 4, I am not satisfied that they do, with any sufficient degree of clearness, or that they do at all, indicate upon what clause it was that the importer relied as securing him the 19 per cent. duty.

The only question is whether a protest against paying 24 per cent. on worsted-stuff goods, "claiming that under existing laws said goods are only liable to a duty of 19 per cent." is a protest "setting forth distinctly and specifically the grounds of objection to the payment thereof."

It is respectfully submitted that a comparison of the

protest with the statute is a sufficient answer to the case of these plaintiffs in error.

It is respectfully submitted that the judgment rendered in favor of the plaintiffs below should be reversed.

A. X. PARKER,
Assistant Attorney-General.

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Office Supreme Court U. S.
FILED,
JAN 27 1891
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 690.

ROBERT SCHELL, &c., *vs.* VICTOR FAUCHÉ, &c.

BRIEF FOR THE DEFENDANTS IN ERROR.

S. F. PHILLIPS,
F. D. McKENNEY,
For Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 690.

ROBERT SCHELL, &c., *vs.* VICTOR FAUCHÉ, &c.

BRIEF FOR THE DEFENDANTS IN ERROR.

This is one of what are known as the *Mousseline de laine* cases, involving questions upon importations at New York in the years 1857, 1858, and 1859.

No question is made by the Government that the proper rate of duty upon the above-named goods was, as claimed by the importers, 19 per cent. instead of the 24 per cent. demanded by the collector. A stipulation to that effect appears upon the Record, folio 56. The only questions now outstanding are as to the actual exaction in each case of 24 per cent., the sufficiency of the protest, and other secondary matters required by the statute as preliminary to a recovery of duties improperly exacted.

However, it may be well to state briefly that by Schedule D of the customs-duties act of July 30, 1846 (9 Stat., 46), "Manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for" were made liable to a duty of 25 per cent. ad valorem, whilst by section 1 of the like act of March 3, 1857 (11 Stat., 192), the duty upon all articles enumerated in the above schedule was reduced to 19 per cent. In modification of this provision the act of 1857 further provided (sec. 2) "that all manufactures composed of cotton which are bleached, painted, or dyed *and delaines* shall be transferred to Schedule C" of the act of 1846. Inasmuch as the latter schedule had imposed a duty of 30 per cent. upon the articles therein enumerated, and this by the act of 1857 was reduced to 24 per cent., it appears that "delaines" were *separated* from the "worsteds," &c., enumerated in the act of 1846, and so, after March 3, 1857, were to pay 24 per cent., whilst the latter were to pay only 19 per cent.

A question occurred soon after the passage of the later act whether, within its meaning, "*mousseline de laines*" were "de laines." The collector seems to have ruled at first that they were not, and thereupon to have required a duty of 19 per cent. But during the summer of 1857 the Secretary of the Treasury decided that they were de laines, and as such liable to 24 per cent. The present record shows (folio 71) that upon the *original* entry in Exhibit No. 1, made in June, 1857, a duty of only 19 per cent. had been required, whilst before the "*examined*" packages in such entry had been delivered (in July) an additional 5 per cent. was exacted, so that the protest in that case came to be made upon the

"amended" entry, no dispute as to the rate of duty having arisen betwixt the importer and the Government until then.

The grounds of the exception to the exaction in question taken by the importers will be found stated in protests upon folios 71 and 72, and more at length in that commencing on folio 64—that is, in brief, that "de laines" as known to the trade were goods "composed of a cotton warp and a worsted weft," whilst "mousseline de laines" were "wholly of worsted." In 18— an elaborately prepared case was tried at great length upon this issue, and at the desire of the Government it was retried, the result in both cases being in favor of the importers, and upon this the Secretary of the Treasury issued orders that the decision should be acquiesced in, and that all cases in which 24 per cent. had been exacted and the claim of the importers had been duly presented at the time of exaction, should be settled upon that basis. This has been done in many cases involving large amounts. Accordingly in the present record the Government makes the admission first above stated.

As has heretofore been stated to the court, a stipulation upon file by the parties to such other *mousseline de laine* cases on the docket as present one or more of the points which arise in the present bill of exceptions, applies the result of the present hearing to them respectively.

The record now under consideration presents questions arising upon more than sixty entries (folio 58, &c.), made at various times betwixt July 25, 1857, and December 17, 1859; and after a trial in October, 1887, which lasted for ten

days, a verdict was rendered for the importers, and thereupon judgment given for $53,492.56. (Folio 50.)

The most important questions at issue in this record are (1), as to the presumption or proof as to timeliness of protest, service upon the collector, and payment of duties that arise upon the face of papers nearly or quite 30 years old produced upon trial from the custom-house; (2), whether in case the rate of duty complained of were not exacted at the original entry, but only after appraisement, protests before such final exaction were competent, the case being that $\frac{1}{7}$th part of such entry remained still in the hands of the collector for examination, whilst the additional duty demanded was only $\frac{1}{20}$th part thereof; (3), whether two forms of protest the top of one of which had been attached to the bottom of the other with paste, the only address to the collector being at the top of one and the only signature of the protestants at the bottom of the other, constitute *one* instrument, or *two;* (4), as to the effect produced upon subsequent importations without accompanying protests by a previous prospective protest betwixt which and these importations certain specific protests based upon the same ground of protest have intervened, and (5), whether failure to *record* protests in certain books at the custom-house affects their validity.

Upon the trial below the first entry in evidence (folio 61) was that numbered 5 in the list given upon folios 58, &c., and this was done probably because that entry represented a large class of the entries in question—32 others (26 enumerated on folio 66, 5 on folio 80, and *one* on folio 85) stand-

ing upon like ground; and besides, the form of proceeding thereunder gave a better occasion than the previous entries for evidence which it seemed proper to introduce at the opening of the case as to the methods of proceeding in the custom-house in making entries, protests, &c., (folio 61, and see further upon the same matter folios 113, &c.)

The protest upon entry No. 5 was *specific* and in detail (64). Objection was made to its introduction in evidence (1), because it did not appear to have been *served* upon the collector, and (2), because if so served at all it did not appear not to have been served *before payment* of the duty in question.

The reply to this is that the papers of which this protest is one were produced at the trial under subpœna from the proper public respository for such papers, in which they had been lying for many years; and therefore that a strong presumption exists that they had originally been properly applied for the purposes of that business to which, upon their face, they were intended to apply, or, in other words, that the protest *had been served* upon the collector, and was so served *before payment* of the duties. The date of the protest ("January 30," 64) is presumably that at which it was "made," and the endorsement of the date of the payment of the duty ("February 1," 62) shows presumably that at which this was done. This is elementary and long-established law. (1 Green. Ev., secs. 38 and 38*a*, and notes.)

As for the matter of the payment of the duties upon these entries, it is to be added that near the close of the trial (122, 123) counsel for the Government admitted that endorsements of payment appearing upon the papers produced

from the custom-house make *prima facie* proof of such payment; and this concession of course renders immaterial certain objections upon the record to the competency of other evidence of such payment by contemporaneous admissions made by the Secretary of the Treasury in the course of office, offered by the plaintiff and admitted by the court (68, &c.)

After entry No. 5 and the 26 other entries said (66) to stand upon like ground the plaintiffs introduced No. 1 of the list on folio 58.

There the entry had been made in June, 1857, at a time when apparently the Government had not yet come to a conclusion as to the rate of duty to be exacted, for upon the original entry the collector had imposed a duty of 19 per cent., as conceded by the importers. *Seven* packages were included in that entry. Upon payment of the duty originally required *one* package, as by law required, was sent to the office of the appraiser, and the other six were delivered to the importers. During the time of such appraisement it was decided that the goods were subject to a duty of 24 per cent., and before the examined package was delivered this additional 5 per cent. was exacted and paid. In other words, whilst $\frac{1}{7}$th part of the value of the goods was still in the hands of the Government the owners thereof were required to and did pay $\frac{1}{20}$th of that value in order to release them. The "amended entry" (70) shows that the protest was made July 25, and the exaction thereby protested against, upon the same day. The presumption thereupon is that the former was made at such time of that day as to make it effective in regard to the lat-

ter. That was the business which the parties had in hand. Also see principle in Rankin *v.* Hoyt, 4 How., 327.

This point is one of those decided in the leading case, Marriott *vs.* Brune, 9 How., 619. Speaking of entries made previous to the protest, the court said there that where the payment of the duties had been closed up such protest would be invalid: "But where the duties had not been closed up in any cases when the written protest in April was filed, though the preliminary payment of the estimated duties had taken place, the court justly considered the protest valid." The reason for this assigned at that place by Wayne, J., may be not the only one assignable. That (supposing examined packages still to be in the hands of the collector, as here) the importer is at such point still in no position to defy the Government *to sue:* that in the present case the Government might have made its money without suit by selling the goods still in hand; and, therefore: that the importer did pay the additional five per cent. in order "to get possession of his goods" is plain.

That, presumably, was the situation in Marriott *vs.* Brune; and this distinguishes the ruling there from the late ruling of the COURT in Porter *vs.* Beard (124 U. S., 429), where the *whole* duty sought to be recovered back had been imposed upon goods which had been surrendered to the importer, and where, of course, at the time of the exaction the importer did not pay in order to get possession of goods bound for the duty.

In conclusion, it is also submitted that each "entry" here was *a unit,*—so treated by the Government in taking packages therefrom as samples of the whole, and therefore so to be treated also so long as any part thereof remains undis-

charged from duty in its hands, especially as said by Judge Lacombe below (182) in connection with the "*ten-day bond.*"

Under the concession (122, 123) already referred to, and as well also the presumption just stated, the admission in evidence of Secretary Cobb's letter (folio 68: and as well of those at folios 129, &c.) was immaterial. However, it will be observed that this letter was not offered for any purpose to which under Watson *vs.* Barney, 92 U. S., 449, it would have been inapplicable, but only as an admission (*valeat quantum*) by the Secretary, in a course of office then practiced in such matters, that a certain protest and payment had been made. Under that course of office it seems that admissions of facts made therein by the Secretary would not lose their effect, because afterwards it had been decided that he had been mistaken in supposing that the statute of 1857 included in its provisions the goods in question. The facts so admitted were just as important to the act of 1846, which did include those goods, as to that of 1857. And the Secretary was equally the representative of the Government under both statutes. However this may be, it is again submitted that the papers produced from the collector's office obviously concern the well-known business of importation, payment of duty, and protesting, and therefore that whilst presumption would not supply *substantial facts* where wanting, yet it does throw upon the other side the onus of proving that the papers introduced and having such a *color* were not employed at the time to which they refer in such order as to make them *effective* for the obvious purposes of their existence.

The short protest in number 1 (71) is sufficient; it refers

to the goods in question as being a "*manufacture of worsted;*" and that is the very term by which Schedule D of the act of 1846 designates certain goods upon which a duty of 19 per cent. is laid (page 1, above). The authorities show this to be abundantly *specific* and expressive of *grounds*. See the principle stated in Converse *vs.* Burgess, 18 How., 413, and well illustrated in Morgan's case, 112 U. S., 495, and others cited therein.

The objections to No. 2 (72) are covered by what has already been submitted.

Nos. 3. and 4 were excluded from the verdict by the learned judge below. This ruling was the subject of a writ of error (docket, No. 691) taken by the plaintiffs below; but by stipulation that is to be dismissed.

No. 5 having been already considered, the next entry for examination is No. 6.

In that the protest consisted of two printed forms of protest that had been *pasted together*, and were attached to the entry by a wafer. The first of these forms was one applicable specifically to entries of *mousseline de laines*, and the second to exactions upon *charges* and *commissions*, etc. The latter also contained a clause of *prospective protest*.

The objection to the admission of this paper was that the physical connection of the *two* forms by *paste* did not make the whole a unit, and therefore that there was no protest against the duties on the mousseline de laines because that *form* was not signed.

The only date ("New York, February 10th"), and address ("Augustus Schell, Esq., collector," &c.), of this composite

paper was at its top, whilst the only signature of the protestants was at its bottom. Upon its face, therefore, it is evidently a single instrument; so that its prospective clause, by the phrase "this protest," gave notice to the collector that the importers protested as well against the mousseline de laine duty as against that upon *charges*, &c., *for* "*all future importations by us.*" Mr. Schell himself must certainly have so understood it; and a bit of evidence (147) introduced by the Government ("form protest") indicates expressly that such was the understanding also of the official who recorded it in the "protest books."

The contention in question ignores the obvious necessities of the situation in which importers at New York are placed. The foreign commerce of that great port when viewed in the mass is a magnificent object for either the eye or the mind. Regarded more nearly its instruments and details are often less neat and elegant than they are to-the-purpose and effective. To persons occupied therein the circumstance that these are "rough" is immaterial, so that they be "ready." A spliced cable is as good as another in the exigencies of a storm, and there is nothing to hinder a like effect for a spliced protest at the collector's office during the repeated "move-ons" urged by persons in the rear of a procession before that official.

That papers attached to each other "physically"—that is, by paste, a string, a pin, or otherwise—constitute one document, unless there be something upon the face to forbid, has been often decided. (Reed, Stat. Frauds, section 344.)

In Tallman *vs.* Franklin, 14 New York, 584, it was held that two papers *pinned* together made one within the statute of frauds, the court saying that that case was in principle

the same as those in which papers are fastened together by gum, or wax, or wafer, "as to which no difficulty would have arisen." In Hutcheon *vs.* Johnson, 33 Barbour, 395, the papers had been *pasted* together, and the decision was the same.

In Kenworthy *vs.* Schofield, 2 B. and C., 945, at an auction the sale was subject to certain conditions, which were read by the auctioneer before the bidding, but which were not attached to the catalogue or referred to by it. Holroyd, Judge, said: "The argument for the plaintiff is that the conditions being in the room were virtually attached to the catalogue. But I think that as they were not actually attached or clearly referred to, they form no part of the thing signed."

In Martin *vs.* Hanlon, 4 Strobh. Law, 168 (53 Am. Dec., 670), the phrase "material ligament" is used to denote that which in the absence of reference from one to the other may constitute several papers one.

Gruder *vs.* Farnum, 10 Pa. St., 98, is a case in which the different sheets of a will were fastened together by a *string*.

Entries 11 and 13 contained protests in all respects like that of No. 6, and therefore require no more to be said here.

No 7 was without an accompanying protest, and the plaintiff relied upon the prospective protest in No. 6.

Nothing more need be said to the objections upon behalf of the Government (81) than that if the protest in No. 6 were a unit the prospective clause therein was plainly effective for No. 7 under many decisions in this Court and at circuit (Davies *vs.* Miller, 130 U. S., 284.)

Nos. 8 and 12 (82) were substantially in the same case with No. 7, the former depending upon the prospective protest in No. 6, and the latter upon that in No. 11.

Nos. 9, 10, 11, 12, 13, and 14 having already been considered, the next entry is No. 15. This was without an accompanying protest, and to supply that defect the plaintiffs relied upon the prospective clauses in Nos. 6, 11, and 13, either or all. To this the defendant made the same objection as in Nos. 8 and 12, together with the further objection that the effect of those prospective protests upon No. 15 was intercepted by the intervention of the specific protest in No. 14, citing therefor Baxter *vs.* Maxwell, 4 Blatch., 48.

The reply is that the specific protests in the entries subsequent to No. 6 were based *upon the same grounds* as those in that entry, and therefore were made *ex abundanti cautela*, and "*Abundans cautela non nocet.*"

In the case cited the intervening protest was *upon a different ground* from that taken in the other entries, and was therefore *some evidence* that the importer no longer placed reliance upon the *ground* theretofore stated. He certainly no longer relied upon it *alone*, and there was some presumption that he had changed that ground entirely. Here, upon the contrary, every intervening specific protest [referring herein to all the entries in question] affirms contemporaneously the very ground assumed in the first. The state of mind of the importers therefore remained unchanged. The circumstance that sometimes we have glimpses of the *actual* state of that mind by means of contemporaneous exhibitions of abundant caution, and that sometimes we have to rely therefor upon the prospective

protests is easily explained by the hurry and confusion of the enormous business at New York, of which these transactions were a part; an enormous business in which importers would depend sometimes upon agents sometimes more and sometimes less well informed of what they themselves had theretofore done, or sometimes even be not themselves so sure as at other times as to what precaution had already been taken to secure their legal rights against improper exactions by the collector. In this way the operations of an importer at the *wharf* would not present the same smooth outside as those in his *counting-room. Various methods of exhibiting the same state of mind are not material in case any one of these will hold.*

It is, moreover, to be remarked that a subsequent resort to a specific protest could at most be only *some evidence* that the importer no longer relied upon a previous prospective protest. It would have made a question of intention to be passed upon by a jury. The defendant below, however, insisted, in the present case, that it had became *a matter of law* that such change had taken place, and thereupon required the court to exclude entries to which no other than the prospective protests applied. At no point in the record did he ask *to go to the jury* upon that or upon any other matter. It is obvious, from a perusal of the record, that both parties regarded the questions raised by them respectively as being addressed *to the court,* and that the action of the jury was regarded as merely formal. What the defendant asked from the court were only *peremptory directions* to the jury. (Folios 169, &c.)

In Robertson *vs.* Edelhoff, 132 U. S., 614, 616, the defendant had asked the court to direct the verdict in his favor; but

this was denied, and he excepted; thereupon, at the request of the plaintiffs, the court directed the jury to find a verdict in their favor, and this was done, and the defendant excepted thereto. Upon this state of things the court remarked at the close of its opinion that the defendant "did not ask to go to the jury." Such is the state of the present record, except that it does not appear that the *plaintiffs* here asked for any direction. Both parties, however, as has been observed, seemed to have referred their contentions entirely *to the court.* So that an assignment of error to the effect that he had not allowed either of them to go to the jury would be inadmissible.

The above objections and remarks apply also to 22 other entries enumerated at the bottom of folio 83.

Numbers 14, 16, and 41, in which the protest was *attached* to the entry and invoice but was undated (84), and number 34, where the protest was *detached*, but had words and figures endorsed so as to identify it (85), were also objected to for reasons stated in connection with number 5, and therefore it seems unnecessary again or further to reply to these.

Upon folio 85 begins certain evidence as to "protest books" kept in the custom-house in accordance with article 387 of the Regulations of 1857, quoted at folio 56. These were introduced in order to show that the protests in question did not appear to be *recorded* there. Such evidence is resumed at folio 126, and again at folio 137, continuing to folio 158. Samples of the *irregularity* in regard to dates, &c., with which these protests were recorded appear at folios 139 and also 148.

This evidence was important only in case it should be held that article 387 was more than an internal regulation for custom-house officials, and was binding upon importers.

It is submitted that in point of reason that regulation bound only the officials in the custom-house, and that it could not have been intended that failures upon the part of these persons to record protests should affect importers. It seems sufficient to found this conclusion upon the obvious *intention* of the regulations, but if that intention had in fact been to bind the public a question of the *power* to make it obviously lies behind. Such recording was not a matter which any diligence upon the part of an importer could effect, or whose failure could impute negligence to him.

Although this point is, in point of law, a substantial one, it is of but minute pecuniary value to the importers, affecting as it does only the two first entries; for entries 3 and 4, as has been said, have been excluded from this case, and Nos. 5 and 6 are both found upon record. If the prospective protest in No. 6 covers all importations subsequent thereto, this circumstance, by making, as has been submitted, all the subsequent express protests in the case superfluous, has of course that effect equally upon any record of these. It is, therefore, as to numbers 1 and 2, that the above suggestion as to the intention (or power) of article 387 is confidently relied upon.

These preliminary remarks upon matters presented upon the first 168 folios of the record properly introduce, as is hoped, the requests for directions to the jury upon the part of the Government upon folios 169, &c.

We present these requests in seven different divisions, in accordance with the different principles suggested therein.

I.

Defendants' counsel then moved the court to direct the jury to find in favor of the defendants as to cases 2069, 2070, 2071, 2073, 2074, and 2075 of Exhibit 1, on the ground that these cases having been delivered on the payment of 19 per cent. duty and the additional duty of 5 per cent. now sought to be recovered having been paid after such delivery, the payment of such additional 5 per cent. was not made to get possession of the goods contained in these cases, as required by the protest act of February 26, 1845. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

The defendants' counsel then moved the court to direct the jury to find in favor of the defendants as to the parts of cases 709, 711, 715, and of 716 of Exhibits 44 and 44*a* which were delivered to the merchant on the payment of 19 per cent. duty, on the ground that the additional 5 per cent. duty exacted on the same and now sought to be recovered by plaintiffs was paid after the delivery of such cases and parts thereof, and was not made to obtain possession of the goods as required by the aforesaid act of February 26, 1845. This motion the court denied, and to this ruling the defendants' counsel excepted, which exception was duly noted and allowed.

The defendants' counsel moved the court to direct the jury to find in favor of the defendants as to cases 761 and 762 of Exhibit 52, on the ground, first, that the same were delivered on the payment of 19 per cent. duty, and the 5 per cent. additional duty now sought to be recovered having been paid after the delivery thereof was not paid, if at all, to get possession of the goods, as required by the said act of 1845; and, second, on the ground that there is *no proof* that the part of such additional duties not heretofore disclaimed, but now claimed to be recovered, *was paid*. This motion the court denied, and to this ruling the defendants' counsel excepted, which exception was duly noted and allowed.

The defendants' counsel then moved the court to direct the jury to find in favor of the defendant as to case 766 of Exhibit 54, on the ground that the same having been delivered on the payment of 19 per cent. duty, and the 5 per cent. additional duty exacted thereon and now sought to be recovered having been paid after such delivery, the payment of such additional duty was not made to obtain possession of the goods in such case as required by the aforesaid act of 1845. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

The above motions ~~concern protests upon entries in which~~ the obnoxious 5 per cent. duty was not exacted at the original entry, but ~~only after~~ appraisement, where of course the protest ~~also~~ was after such appraisement, and in order to obtain the cases then remaining under *examination*.

~~These~~ will be left to the remarks already made in connection with such ~~protests~~ herewith: whilst all but No. 1 are also protected by the prospective clause in the protest to No. 6.

II.

The defendants' counsel then moved the court to direct the jury to find in favor of the defendants as to Exhibit 1, 2, 3, and 4, on the ground, first, that the protests, upon which the plaintiffs rely to recover the additional duty of 5 per cent. exacted thereon, being against the exaction of 24 per cent. on worsted stuff goods, there is no proof in the case and no stipulation therein as to the character and material of any of the importations of said exhibits, or as to the rate of duty to which they or any of them should be subject under the law in force at the time they or any of them was made; second, that neither of said protests upon which plaintiffs rely to recover as to such exhibits distinctly and specifically set forth the ground or grounds of objection to the payment of the duties exacted on any of the importations mentioned therein, as required by the aforesaid act of February 26th, 1845. This motion the court denied as to Exhibits 1 and 2, and granted as to Exhibits 3 and 4. To the ruling of the

court in denying the defendants' motion as to Exhibits 1 and 2 defendants' counsel excepted, which exception was duly noted and allowed.

Thereupon the court directed the jury to find for the defendants as to Exhibits 3 and 4, and the jury, in accordance with such direction, found for the defendants as to Exhibits 3 and 4.

To this ruling and direction of the court counsel for the plaintiffs excepted, which exception was duly noted and allowed.

The above motion turns upon the validity of the protest in 1 and 2, and this also has been sufficiently discussed.

III.

Defendants' counsel then moved the court to direct a verdict for the defendants as to each and every importation mentioned in the sixty-two exhibits, excepting those of Exhibits 3 and 4, on the ground, first, that there was no proof or stipulation in the case that the payment of duty sought to be recovered was made to get possession of any of said importations, or any part thereof, as required by the aforesaid act of 1845; second, that there was neither any proof nor any stipulation in the case that any protest against the payment of any part of the duties now sought to be recovered was ever served upon the collector, who exacted them as required by the aforesaid act; and third, that if any protest was so served there was neither any proof nor any stipulation in the case that the same was served at or before the payment of such duties, as required by the aforesaid act. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

This motion takes for granted that the papers produced in all the exhibits excepting 3 and 4 afford no presumption that they were made in due course for the purpose of transacting the business to which they refer; and that is an as-

sumption which, as has been seen, contradicts the earliest lessons in evidence which books of authority give to the student.

IV.

Defendants' counsel then moved the court to direct the jury to find for the defendants as to the importations mentioned in Exhibit No. 6 on the ground that the mousseline delaine protest attached to the entry of said exhibit, upon which the plaintiffs relied to recover, was unsigned, and that the signature of the plaintiffs' firm to the charges and commission protest pasted onto such mousseline delaine protest was not a signature by the claimants, plaintiffs' firm, of such mousseline delaine protest as is required by the aforesaid act of February 26, 1845. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

Defendants' counsel then moved the court to direct the jury to find for the defendants as to the importations mentioned in Exhibit 11 on precisely the same grounds as their motion was made for a direction of a verdict as to the importations mentioned in the entry of Exhibit 6. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

Defendants' counsel then moved the court to direct the jury to find for the defendants as to the importations mentioned in Exhibit 13 on precisely the same grounds as their motion was made as to the importations mentioned in the entry of Exhibit 6. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

Defendants' counsel then moved the court to direct the jury to find for the defendants as to the importations mentioned in the entries of Exhibits 7 and 8 on the ground, first, that no protest was made as to either of said importations as required by the aforesaid protest act; second, that, notwithstanding the prospective clause of the signed charges and commissions protest pasted onto the unsigned mousseline delaine protest attached to the entry of Exhibit 6, such prospective clause is a part of the charges and commissions protest only, and in no way applies to or is a part of the un-

signed mousseline delaine protests to which such charges and commissions protest is pasted. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

Defendants' counsel then moved the court to direct the jury to find for the defendants as to the importations mentioned in the entry of Exhibit 12 on the ground, first, that no protest was made as to any of such importations as required by the act of 1845; second, that, notwithstanding there is a prospective clause in each of the signed charges and commissions protests pasted onto each of the unsigned mousseline delaine protests attached to the entries of Exhibits 6 and 11, such prospective clause is a part of its respective charges and commissions protests only, and in no way applies to or is any part of the unsigned mousseline delaine protest to which its charges and commissions protest is pasted. This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

The directions asked for here assume that two *forms* of protest connected by paste as above do not make one document, and this position also will be left to the effect of what has already been said.

V.

Defendants' counsel then moved the court to direct the jury to find in their favor as to the importations mentioned in Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 43A, 44, 44A, 45, 46, 47, 48A, 52, 53, 54, 56, 58A, 61, and 62 on the ground, first, that no protest was made as to any of such importations as required by the act of February 26, 1845; and, second, that, notwithstanding there is a prospective clause in each of the charges and commissions protests pasted onto each of the unsigned mousseline delaine protests attached to the plaintiffs' prior, in time, entries of Exhibits 6, 11, and 13, such prospective clause is a part of its respective charges and commissions protest only, and in no way applies to or is a part of the unsigned mousseline delaine protest to which its charges and commissions protest is pasted; and, third,

that the effect of any of such prospective clause as to each of the aforesaid subsequent unprotested importations of Plaintiffs' Exhibits 15, 19, 20, 22, 27, 28, 39, 40, 42, 43, 43*a*, 44, 44*a*, 45, 46, 47, 48*a*, 52, 53, 54, 56, 58*a*, 61, and 62 was under the principle laid down in the decision of Baxter *vs.* Maxwell, 4 Blatchford, 32, nullified by intervening specific mousseline delaine protests without prospective clause, as follows: [For details see folio 175, &c.]

This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

This motion seeks to apply the decision in Baxter *vs.* Maxwell, 4 Blatch., 32, to cases in which the intervening protests were made upon the same ground with that of the previous prospective protest; and it also assails the unity of the protest No. 6, as above.

VI.

Defendants' counsel then moved the court to direct the jury to find for the defendants as to the importations mentioned in the entries of Exhibits 1, 2, 10, 11, 13, 14, 15, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 36, 41, 49, 50, 51 on the ground, first, that each of the protests now written on or attached to or detached and separate therefrom and alleged to relate to said exhibits and to have been found on the files of the custom-house are none of them *recorded* in the protest books in which protests are recorded, and therefore appear never to have been served upon the collector or on any authorized agent of the collector; second, that there is neither proof nor stipulation in this case that any of said protests were ever served upon any collector or any authorized agent of his; third, that if so served there is no proof or stipulation in the case that any of said protests were so served on the collector or his authorized agent at or before the payment of the duty now sought to be recovered; and, fourth, that as to none of said importations does the prospective clause of the pasted protest on each of the unsigned mousseline protests attached to Exhibits 6, 11, and 13 entitle the plaintiffs to recover, for

the reasons already mentioned in defendants' motion for the verdict as to said Exhibits 6, 11, and 13; and, fifth, that, if otherwise the plaintiffs would be entitled to recover by virtue of the prospective clause of said pasted charges and commissions protest of Exhibits 6, 11, and 13, the effect of such prospective clause, if any, was under the principle laid down in the decision of Baxter *vs.* Maxwell, 4 Blatchford, 32, nullified as to all of the importations as to which this motion is made, except those of Exhibits 1 and 2, by the various intervening specific protests without prospective clauses and by the various intervening unprotested entries.

This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

The questions here raised, so far as they differ from those above, assume that it is necessary for the validity of a protest that it should have been recorded. It has already been submitted that even if it were admitted that such recording was necessary the direction here moved for could not have been given, insomuch as the prospective protest No. 6 had been recorded.

VII.

The defendants' counsel then moved the court to direct the jury to find in their favor as to the importations mentioned in Exhibits Nos. 14 and 41 on the ground that each of the protests upon which the plaintiffs relied to recover as to the same was *undated*, and there is neither proof nor stipulation in this case that any of said protests was ever served upon the collector, or, if so served, was so served at or before the payment of the duties now complained of, as required by the act of February 26, 1845.

This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

The defendants' counsel then moved the court to direct the jury to find in their favor as to the importation of Ex-

hibit No. 34 on the ground that there is no mention in the protest of that exhibit of the vessel in which the importation was made.

This motion the court denied, and to this ruling defendants' counsel excepted, which exception was duly noted and allowed.

These motions seem to be *de minimis*, and also contradict the presumption heretofore alluded to. Besides, the defendants did not ask to go to the jury.

The exception at the close of the instructions given by the court to the jury, supposing it to have been intended to have any application beyond that of restating the exceptions given above, is objectionable on account of its generality. It seems however, to have been intended as such reassertion.

S. F. PHILLIPS,
F. D. MCKENNEY,
For Defendants in Error.